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IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD P. MYERS
Counsel of Record
ROBERT. E. PAUL
1608 Walnut St., Suite 500
Philadelphia, PA 19103
(215) 735-9200
rpaul@prmpclaw.com

Attorneys for Petitioners
Gloria Gail Kurns and Freida E. Jung Corson

234022

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

DID CONGRESS INTEND THE FEDERAL RAILROAD SAFETY ACTS TO PREEMPT STATE LAW-BASED TORT LAWSUITS?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gloria Gail Kurns and Freida E. Jung Corson are individuals and plaintiffs-petitioners in this action. Ms. Kurns is the executrix of the estate of the late George M. Corson. Mrs. Corson is the widow of George M. Corson.

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OPINIONS BELOW

Defendants-Respondents Railroad Friction Products, ("RFPC") and VIAD Corporation ("VIAD"), moved for summary judgment in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania. RFPC and VIAD argued that there was insufficient evidence of Petitioners' Decedent, George M. Corson's exposure to asbestos from any of Respondents' products to find factual causation. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). VIAD argued that Petitioners' claims were barred by the doctrine of federal preemption. The Philadelphia Court of Common Pleas denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by several other defendants.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[1] District Court Judge James T. Giles denied these

1. A.W. Chesterton was voluntarily dismissed by Petitioners in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining defendants in the state court case before its removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

(Cont'd)

motions, stating that he lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD again moved for summary judgment in the District Court[2] claiming that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted these defendants summary judgment. *Kurns v. A. W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757 (E.D. Pa. Feb. 3, 2009) (App. B at 22a). Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. After briefing and oral argument, the Third Circuit panel affirmed the District Court's orders in an opinion filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir.

(Cont'd)

Linde, LLC f/k/a/The BOC Group f/k/a/ Airco Welders Supply, Inc., ("BOC/Airco") was granted summary judgment by the Philadelphia Court of Common Pleas on May 13, 2008. *See Kurns v. Airco Welders Supply, Inc., Id.* The United States District Court for the Eastern District of Pennsylvania denied Petitioners' motion to reconsider the state court grant of summary judgment to Linde/BOC/Airco, stating that it had no jurisdiction over a defendant that was dismissed in the state court action. (*See* Appendix C at 40a).

2. As noted earlier, only VIAD raised the issue of federal preemption in the state court. However, Pa.R.C.P. P. 1041 provides that when one defendant raises an issue that would defeat the claims as to all defendants, it is deemed filed on behalf of all defendants. The state court rejected VIAD's preemption argument based *upon Norfolk & W.R. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980). RFPC raised the preemption issue before the District Court in the case herein.

2010). (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing *en banc*, which was denied on October 5, 2010. (App. D at 42a).

In addition to the opinions in the instant case, Petitioners' counsel have previously responded to two petitions for writs of certiorari in two Pennsylvania state cases in which the Pennsylvania Superior Court affirmed judgments. In both of those cases, the Pennsylvania Supreme Court rejected petitions for appeal. The sole issue on appeal in those cases is federal preemption. In the first of those cases, the Pennsylvania Superior Court published its opinion affirming judgment. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa.Super. 2010). The Petition for Writ of Certiorari is pending in this Court at No. 10-272.[3] In the second case, *Harris v. Griffin Wheel, Inc.*, the Pennsylvania Superior Court did not publish an opinion. The Petition for Writ of Certiorari is pending in this Court at No 10-520 in *Harris*.[4]

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3. At the conference regarding the Petition for Writ of Certiorari filed by Petitioner John Crane in *Atwell*, this Court asked for the Solicitor General to submit a brief regarding the U.S. Government's views.

4. Although undersigned counsel recognize the importance of the issues raised in the two Pennsylvania cases noted above, counsel's paramount duty to those clients in securing the judgments precludes counsel from acquiescing to the petitions for writs of certiorari there, especially where the issue is better presented in the instant case.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Third Circuit Court of Appeals filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir. 2010). (App. A at 1a). Thereafter, Petitioners timely filed a Petition for Rehearing En Banc with the Third Circuit. The Third Circuit denied a rehearing on October 5, 2010. (App. D at 42a). This Court has jurisdiction under 28 U.S.C. § 1254 (2006).

STATUTES INVOLVED

This Petition presents a question of implied field preemption arising from Congress' enactment of the original Boiler Inspection Act, (hereinafter "BIA"), currently codified at 49 U.S.C. §§ 20701-20703 (2007) as the Federal Railroad Safety Act ("FRSA"), and the Safety Appliance Act, (hereinafter "SAA"), 49 U.S.C. §§ 20301 *et seq.*,

The relevant provisions of the BIA are as follows:

49 U.S.C. § 20701 – "Requirements for Use":

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –
>
> > (1) are in proper condition and safe to operate without unnecessary danger of personal injury;

> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

The relevant portions of the FRSA, 49 U.S.C. § 20106 are as follows:

> (a) **National Uniformity of Regulation**
>
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) **Clarification Regarding State Law Causes of Action.**

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) **Jurisdiction.** Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

The relevant portions of the SAA are:

49 U.S. C. § 20302 - "General Requirements":

(a) General. **Except as provided in subsection (c) of this section and section 20303 of this title [49 USCS § 20303], a railroad carrier may use or allow to be used on any of its railroad lines—**

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power

or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to Receive Vehicles Not Properly Equipped. **A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.**

(c) Combined Vehicles Loading and Hauling Long Commodities. **Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.**

(d) Authority to Change Requirements. **The Secretary may—**

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good

cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. **In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.**

STATEMENT OF THE CASE

A. Form of Action and Procedural History

On June 13, 2007, George Corson ("Mr. Corson") and his wife, Freida E. Jung Corson ("Mrs. Corson"), filed a complaint in the Philadelphia County Court of Common Pleas because Mr. Corson contracted malignant mesothelioma, the only generally-accepted cause of which is asbestos exposure.[5] Mr. Corson died from this disease on November 17, 2007. His daughter, Gloria Gail Kurns ("Mrs. Kurns"), was thereafter appointed Executrix of his Estate and was substituted as a party-plaintiff. Mrs. Kurns and her mother, Mrs. Corson, are Petitioners herein.

Defendants including respondents RFPC and VIAD moved for summary judgment in state court. Generally, the defendants argued that there was insufficient evidence of Mr. Corson's exposure to asbestos from their respective products to merit trial. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The state court denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by the other defendants, including Soo Lines Railroad, the successor to Milwaukee Road.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary

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5. Respondents did not contest the mesothelioma diagnosis nor did they contest that Mr. Corson's mesothelioma was caused by asbestos exposure.

dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the case to the United States District Court for the Eastern District of Pennsylvania. After the case was removed, Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[6] Chief District Court Judge James T. Giles denied Petitioners' reconsideration motions on the grounds that the district court lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD moved for summary judgment in the District Court. This time, both defendants claimed that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted RFPC's and VIAD's summary judgment motions. (App. B at 22a).

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6. Airco Welders Supply, Inc./The BOC Group ("Airco/BOC"), now doing business as part of Linde, LLC, was a party to the Superior Court appeal. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The Pennsylvania Superior Court dismissed the appeal as interlocutory due to the existence of the removed claims in federal court that are the subject of this appeal. *Kurns v. Airco Welders Supply, Inc.*, 986 A.2d 1293 (Pa. Super. 2009).

A.W. Chesterton was voluntarily dismissed by Appellants in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining non-dismissed defendants in the state court action prior to removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. The Third Circuit affirmed the District Courts orders on September 9, 2010. (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing en banc, which the Third Circuit denied on October 5, 2010. (App. D at 42a). This petition for Writ of Certiorari followed.

B. Facts Necessary to the Disposition of the Case

From 1949-1974, Mr. Corson was exposed to asbestos from his work on the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee Road"). He worked on locomotives manufactured by the Baldwin Locomotive Company, predecessor-in-interest to Respondent VIAD Corporation ("VIAD"). These locomotives were insulated with asbestos. The locomotives also had asbestos-containing brake shoes distributed by Respondent Railroad Friction Products Corporation ("RFPC"), which Mr. Corson had to change on a regular basis.

Mr. Corson testified during his deposition that he first worked for the Milwaukee Road in Mobridge, SD in 1949. He moved to Montana, and continued to work for the Milwaukee Road there. As a machinist's helper, he worked on Baldwin steam-powered locomotives.[7] Pipefitters, boilermakers, tinsmiths and painters worked near him. The pipefitters removed old insulation from the boilers and installed new insulation. The pipefitters also used asbestos cement and tape.

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7. Mr. Corson knew that the locomotives were manufactured by Baldwin because the name was on the front of the engine, below the boiler.

Sometimes old insulation was ground up into a powder, mixed with water, and re-used as a paste. Mr. Corson handled what he called "rigid asbestos." This came in sheets and insulated the boiler. His work on boiler valves required him to handle the insulation around the boiler. Once a year, the machinists would remove all the asbestos from the boiler so they could test the strength of the metal by tapping all around the boiler with a hammer. The pipefitters replaced all the insulation except that around the valves, which the machinists replaced.

In the 1960s and into the early 1970s, Mr. Corson's son, Terry Corson ("Terry"), worked with him at Lewistown, MT. Terry testified that the Milwaukee Road had different varieties of brake shoes in stock at Lewistown, including grinding shoes, freight car shoes and locomotive shoes. There was usually a pallet of freight car shoes and a pallet of locomotive shoes on hand, and each pallet held hundreds of shoes. Terry estimated that he and his father changed about a dozen brake shoes a week. They used COBRA composition brake shoes[8] on both boxcars and locomotives. Terry did not recall using any other brand. Terry testified that his father was a "working foreman" who did brake changes himself. Mr. Corson worked on the Milwaukee Road until 1974.

Mr. Corson was diagnosed with asbestos-caused malignant mesothelioma in 2007, and he died from this disease.

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8. As stated in Petitioners' original Complaint and conceded in RFPC's motion, RFPC distributed COBRA asbestos-containing railroad brake shoes.

REASONS FOR GRANTING THE PETITION

CONGRESS DID NOT INTEND THE FEDERAL RAILROAD SAFETY ACTS[9] TO PREEMPT STATE LAW-BASED TORT LAWSUITS.

A. This Court has consistently allowed railroad workers and non-railroad workers alike to sue the entities subject to the railroad safety acts under state law.

In its decision in this case, the Third Circuit held that federal legislation preempted the field of railroad safety regulation so as to preclude state tort lawsuits against companies that supplied asbestos-containing equipment to the railroads. In so ruling, the Third Circuit relied upon this Court's decision in *Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926). For the reasons that follow, this Court's review is necessary to correct the Third Circuit's and other lower courts' gross misinterpretations of this Court's decisions with respect to railroad safety regulations.

In *Napier*, this Court held that federal safety legislation and regulations occupied the field of "legislation." *Napier* struck down state laws that required particular kinds of locomotive equipment, such as firebox doors or cab curtains, on locomotives traveling through a particular state. 272 U.S. at 609-610. Since

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9. This Court has repeatedly held that the FRSA, BIA, SAA and FELA are to be read as one. *Urie v. Thompson*, 337 U.S. 163 (1949). In this Petition for Certiorari, Petitioners sometimes refer to these acts as a group as "railroad safety acts."

locomotive components were potentially within the federal government's scope of authority, the states could not legislate even in the absence of federal government action: "We hold that state ***legislation*** is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 612. (emphasis added). The field was thus defined as "legislation."

For the first 70 years following *Napier*, this Court and other courts of last resort at the state level interpreted *Napier* as establishing the primacy of federal establishment of railroad safety standards. However, in giving precedence to the federal standards, this Court and other courts allowed injured parties to remediate violations of those standards through state tort law remedies.

Typical of the cases decided after *Napier* is *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U.S. 141 (1936). In *Tipton*, a California railroad switchman, not engaged in interstate commerce, was injured as a result of a defective coupling mechanism. *Id.* at 145. This Court found that injury resulted from a violation of the federal standards. *Id.* at 146. In construing the Safety Appliance Act ("SAA"), this Court held:

> The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest, that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce. The absolute duty imposed

> necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.
>
> *Id.* at 146

Thus, Tipton was left to state remedies, which in this case, were limited to workers compensation. *See also, Gilvary v. Cuyahoga V. R. Co.*, 292 U.S. 57 (1934).

In *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court upheld a personal injury verdict based upon a finding that the defendant railroad had violated the SAA's requirements as to brakes. Defendant's train hit plaintiff's automobile at a grade crossing. Plaintiff was not a railroad employee, and her claim was not governed by FELA. This Court ruled that she could sue for a violation of the SAA and that her right to bring her suit "derived from principles of common law." *Id.* at 598. The Supreme Court held that issues other than the railroad's duty to comply with the specific requirements of the SAA were governed by state law. *Id.* Had *Napier* been read as broadly as defendants

suggest, the *Meredith* lawsuit would have been preempted.

In *Atchison, T. & S.F. R. Co. v. Scarlett*, 300 U.S. 471 (1937), a railroad worker was injured when descending a ladder from a box car. The ladder itself was a required safety appliance. The worker's foot slipped on a slanting brace rod, which was immediately behind the ladder. The ladder itself conformed to the federal regulations promulgated under the SAA, and as a result, this Court held that there was no violation of the SAA. *Id.* at 472. This Court nevertheless found that the worker had a common law remedy sounding in negligence for the proximity of the slanting brace rod to the ladder:

> The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk.
>
> *Id.* at 475

Contrary to Respondents' reading of the law following *Napier*, this Court allowed the lawsuit. The worker was prevented from arguing to the jury that there was strict

liability because the ladder complied with the Safety Appliance Act. *Id.* at 474. Given that this Court cited *Napier* in this decision, and that this Court remanded the case for a trial on the negligence claim, this Court clearly did not construe the railroad safety acts as precluding such lawsuits.

In *Breisch v. Central R. of N. J.*, 312 U.S. 484 (1941), this Court recognized the principle decided in *Tipton*: "It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance Acts. Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts. The federal statutes create the right; the remedy is within the state's discretion. (Footnotes and citations omitted)." *Id.* at 486. In *Breisch*, this Court recognized that a railroad employee not engaged in interstate commerce could afford himself of a state court common law remedy against the railroad, despite the existence of the Workers Compensation Act.

Despite *dicta* in *Napier* that could have been interpreted so as to preclude all state regulation of railroad safety, many states enacted legislation or regulations that affected the railroads. For example, Iowa directed that all railroad operate cabooses with two platforms. The railroad complained that Iowa had no right to enforce such a regulation. In *Fleming v. Richardson*, 24 N.W. 2d 280 (Ia. 1946), the Iowa Supreme Court upheld the regulation against a preemption argument. In a later case, the Iowa Supreme Court explained its rationale:

> An exercise by a state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive the two acts cannot be reconciled or consistently stand together. *Fleming v. Richardson*, 237 Iowa 808, 830, 831, 24 N.W.2d 280; *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Terminal R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571; 15 Am. Jur.2d, Commerce, section 69, page 714; and 15 C. J. S., Commerce, section 11, page 266.
>
> *Powers v. McCullough*, 140 N.W. 2d 378, 382 (Ia. 1966)

Because the SAA said nothing about the number of platforms on cabooses, Iowa was free to regulate.

In *Shields v. Atlantic C. L. R. Co.*, 350 U.S. 318 (1955), this Court held that an independent contractor had a right of action against the railroad under state law in strict liability for violating the Safety Appliance Act. There was no suggestion whatsoever that the Safety Appliance Act precluded a lawsuit against the railroad. This Court found that the independent contractor was owed a duty:

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running

> board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray v. Southern Pacific Co.*, 335 U.S. 520; *Brady v. Terminal Railroad Assn.*, 303 U.S. 10; *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589; *Louisville & N.R. Co. v. Layton*, 243 U.S. 617.
>
> *Id.* at 325

Not a single member of the Court, either in the majority or the dissent, suggested that plaintiff did not have a remedy under state tort law for the alleged Safety Act violation.

Another typical case is *Boyer v. Atchison T. & S. F. R. Co.*, 38 Ill. 2d 31 (1967), *cert. denied*, 390 U.S. 949 (1968). There the railroad passenger, traveling on a free pass issued by the railroad, sued to recover for violation of the SAA because he was thrown to the floor when a defective coupler broke. The passenger was allowed to press a claim in state court under strict liability. Again, the passenger's right to assert the state court action was unquestioned.

By the time that the Pennsylvania Supreme Court decided *Norfolk & W. R. Co. v. Pa. Public Util. Com.*, 489 Pa. 109 (1980), the parameters of *Napier*, *Tipton* and *Shields* were generally understood to restrict states from legislating or regulating in conflict with the Interstate Commerce Commission ("ICC") or Federal Railroad Administration ("FRA"). The Pennsylvania

Supreme Court also took guidance from the 1970 legislative history of the FRSA:

> Appellees urge that *Napier* and *Bessemer* are controlling on the issue of preemption by the Boiler Inspection Act. We disagree. While the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 no longer permits that reading. Section 205 provides:
>
> > A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. [footnote omitted].
>
> *Id.* at 120-121.

It is noteworthy that the Pennsylvania Supreme Court's interpretation of the FRSA and the harmonization of *Napier* with some of the cases cited above continued for sixteen (16) years without change.

Manufacturers and suppliers of railroad products became regulated entities under the FRSA, along with the railroads in 1992. 45 U.S.C. § 34. The stampede to deprive railroad workers injured by defective products from pressing claims against those manufacturers and suppliers began in earnest thereafter. Ignoring the more than 70 years of precedent noted above, the 9th Circuit ruled that *Napier* prevented railroad workers alleging hearing losses from pressing state law tort claims against the manufacturers and suppliers of devices that caused the hearing losses. *Law v. GMC*, 114 F.3d 908 (9th Cir. 1997). Relying upon *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the court in *Law* held that the Boiler Inspection Act preempted the products liability case against the locomotive manufacturers. Since *Marshall* is the underpinning of *Law*, it is important to analyze.

In *Marshall*, the widow of a motorist killed at a grade crossing by a Burlington Northern train sued the railroad. The theory of recovery was that the train should have been equipped with oscillating lights and/or strobe lights. The *Marshall* court did give the FRSA broad preemptive effect. 720 F.2d at 1153. However, the *Marshall* court also pointed out that the FRA had considered requiring trains to be equipped with the equipment that the plaintiff argued was necessary to prevent the accident in question, but that the agency had rejected that requirement. 720 F.2d. at 1153-1154.

Thus, the theory of recovery was in direct conflict with the federal regulatory requirement because it took on the character that the federal agency should have mandated a particular requirement that it rejected.

Law expanded the *Marshall* view of preemption by reading *Napier* literally and broadly without any of the limitations imposed by such decisions as *Tipton* or *Shields*, supra. The *Law* court failed to mention that in 1992, Congress amended the safety acts to subject manufacturers and suppliers of railroad equipment to federal regulation and potential fines for non-compliance. 45 U.S.C. § 34 (Pub. Law 102-365, § 9(a)(8)). The railroads had been subject to safety acts since 1893 and understood that they were subject to state tort lawsuits for violations of federal safety standards. However, the manufacturers of railroad products ignored the decades of court decisions that allowed state tort lawsuits against the regulated entity, viz. the railroads. The manufacturers took a more aggressive stance: since they were subject to federal regulation, they reasoned, there could only be a federal remedy for violations of those regulations, and state remedies were preempted. The *Law* court accepted this argument in order to effectuate "national uniformity of regulations." 114 F.3d at 110-111.

The *Law* court noted that injured railroad workers could make a claim under FELA for their injuries, and that "[p]roof of a BIA violation is enough to establish negligence as a matter of law and neither contributory negligence nor assumption of risk can be raised as a defense." Railroad workers who are injured by trains which are "in use" can make a strict liability claim under

the BIA or SAA. However, railroad workers who are injured as a result of working on trains in the repair shops, such as Mr. Corson in this case, cannot make strict liability claims under the BIA or SAA.

This Court has rarely ruled upon what constitutes "in use." *See*, *Brady v. Terminal R Ass'n*, 303 U.S. 10, 13 (1938). On those rare occasions when the issue has arisen, the lower appellate courts have uniformly held that the BIA and SAA "exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Steel v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983); *Angell v. Chesapeake & O.R Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 US 885 (1952). Put somewhat differently, neither the BIA nor the SAA applied to Mr. Corson since he was injured as a result of exposure to asbestos that occurred in the railroad repair shops. It stands to reason that if the statute does not give Petitioners a claim, it cannot preclude Petitioners from other remedies.

Without question, *Law* began the "reign of error." However, just because a number of lower courts have followed *Law* does not make it correct. As noted above, this Court has never endorsed the broad reading of implied federal field preemption that the literal language of *Napier* suggested. Rather, this Court in later decisions interpreted *Napier* as applying to the field of federal legislation (and regulation), and where there were conflicts, this Court upheld the supremacy of federal law. By granting certiorari in this case, this Court can reestablish the harmony in this Court's

decisions interpreting *Napier*, harmony that existed before the decision in *Law* and the misguided decisions following *Law*.

B. Neither the Safety Appliance Act nor the Boiler Inspection Act contained preemptive language, and subsequent reenactments have evidenced congressional intent not to preempt state regulation.

The legislative history of the railroad safety acts documents congressional intent to allow state tort lawsuits. Beginning in 1893 with the adoption of the first Safety Appliance Act, the railroads were subject to state court lawsuits. This Court held that Congress had the power to require safety devices on every railroad engaged in interstate commerce, even if the particular cars were only engaged in intrastate commerce. *Southern R. Co. v. United States*, 222 U.S. 20 (1911). The primary purpose of the railroad safety acts was to protect trainmen and the riding public. *Urie v. Thompson*, 337 U.S. 163 (1949).

The original SAA and BIA contained no statement of congressional intent to preempt state regulation or state tort lawsuits. In 1970, though, in enacting the FRSA, Congress declared that it did not want to preempt state regulations, and therefore, state-based remedies. *See* H.R. REP. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 1970 WL 5692 (Leg. Hist.).

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to

> the reported bill, the task force recommended that existing state requirements remain in effect **until** preempted by federal action.
>
> H.R. REP. 91-1194, at 4108 (emphasis added).

Prior to 1970, the FRA had allowed the states to regulate unless and until the FRA chose to regulate in the same area. The purpose of the 1970 amendments was to confer congressional approval on this practice. The legislative history of the FRSA demonstrates that Congress believed that its goal of protecting railroad workers' safety could best be accomplished by recognizing state authority over some rail safety matters. The FRSA authorized state regulation in "any area of rail safety" until preempted by an action of the Secretary (i.e. a regulation or order, not a statute) "with respect to the **particular** matter." It did so for the stated purpose of "promot[ing] safety in all areas of railroad operations":

> Summary of the Reported Bill
>
> **The Purpose of this bill is to promote safety in all areas of railroad operations,** to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials.
>
> To provide the legislative framework to achieve this purpose, the reported bill includes,
>
> * * *

4. State Regulation

> Section 205 **authorizes states to regulate** in **any area of railroad safety** until the Secretary acts with respect to the **particular** subject matter.
>
> *Id.*, at 4112 (emphasis added).

The final recommendations in the legislative history contain the same federal and state relationship, namely that the power to regulate matters of rail safety be continued in the states, and even expanded, unless and until a federal regulation specifically preempted the state regulation:

> The specific recommendations of this task force are:
>
> * * *
>
> 3. Existing state rail safety statutes and regulations remain in force until and unless **preempted by federal regulation.** Administration of the program should be through a federal-state partnership, including state certification similar to the certification principles set forth in the federal natural gas pipeline safety act of 1968.
>
> *Id.*, at 4129.

Congress decided to retain the provisions of the BIA and SAA intact, but at the same time precluded any

preemptive effect previously attributed to them, except when federal law or regulations conflicted with state law or regulations. That is the meaning of the legislative history. While the legislative history documents that the BIA and SAA would "continue without change," the same paragraph of the legislative history also documents that the BIA and SAA would continue to be supplemented by state law. Had Congress intended that the BIA and SAA preempt state law, Congress would not have set forth the following language:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with **provisions for state participation to assure a much higher degree of railroad safety in the years ahead.**
>
> *Id.* at 4105 (emphasis added)

As can be seen above, in its 1970 reenactment of the BIA and SAA, Congress adopted a specific lack of preemption clause, now codified at 49 U.S.C. § 20106(a). The lack of preemption clause broadly applies to "railroad safety matters."

In cases decided after the passage of this reenactment, this Court has validated congressional intent in specifying the degree to which federal

legislation should have or not have a preemptive effect. Where a statute contains an express preemption clause, as the FRSA does here, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Under *Easterwood*, the clause cited above in the 1970 reenactment should be given such effect. Congress did not intend to preempt state law tort claims.

Congress not only recognized state regulatory authority in the preemption clause cited above, but also expressly recognized that the states' authority over rail safety extends to "railroad equipment" and "rolling stock." Congress provided that a "State may participate in [investigations and surveillance] activities when the safety practices for **railroad equipment**, facilities, **rolling stock**, and operations in the State are **regulated by a State authority**..." 49 U.S.C. § 20105 (emphasis added).[10] Had Congress wished to occupy the field, Congress would not have included this express recognition of already-existing state authority, which the 1970 amendments expanded.

In 2007, Congress amended the FRSA, adding Section (b) to the prior enactment.[11] The statute now reads:

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10. Rolling stock refers to rail cars and locomotives, which are also the subject of the BIA and SAA. 49 C.F.R. § 224.5.

11. Section (a) has been the law since 1970, except for a homeland security reference.

(a) National uniformity of regulation

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106 (b) (2007).

Under this revised statute, Congress showed its continued intent to reject the expansive and outdated preemptive effect that this Court gave the BIA and SAA in *Napier*. Since the Third Circuit mistakenly based its opinion on that reading, this Court should entertain review.

This Court has stated that it regards § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted).

The Secretary of Transportation through the FRA has never issued a regulation or an order "covering the subject matter" of asbestos in railroad equipment, the asbestos content of brake shoes, or warning of the risk of asbestos exposure at railroad worksites. 49 U.S.C. § 20106(a)(2). There is no express regulation or order with which a state tort lawsuit based upon could conflict. This Court found that Congress' use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* (internal citation omitted). Since there are no federal regulations that "substantially subsume" the subject matter of Petitioners' tort claims against Respondents, the Third Circuit was wrong in holding that Petitioners' claims were preempted.

The FRA has never addressed asbestos, nor has it ever issued regulations on asbestos or in-shop safety. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268.[12] Prior to the adoption of the Occupational Safety and Health Act, the FRA left shop safety to the states to regulate. In 1978, after the creation of Occupational Safety and Health Administration ("OSHA"), the FRA stated that it would henceforth rely on OSHA to regulate workshop safety, and it so stated in 49 C.F.R.§ 221 (1978):

> We, therefore, believe that the FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate

12. The Fourth Circuit also noted this lack of regulation in 1976 in *Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976), *cert. denied* 419 U.S. 999 (1976): "The Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities." 539 F.2d at 338.

> our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.
>
> 49 C.F.R.§ 221 (1978).

The OSHA standards expressly do not preempt state law claims. The OSHA savings clause, 29 U.S.C. § 653(b)(4) (1970), states that nothing "...shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Assuming *arguendo* that the Third Circuit's view of implied federal field preemption over railroad safety was correct, the railroad safety regulations could not preclude Petitioners' lawsuits. The FRA narrowed the field of federal regulation by excluding railroad shops from the ambit of its regulations. The federal railroad safety regulations can only preempt lawsuits regarding situations and parties to which the regulations apply. The regulations do not apply to repair shops. OSHA's regulations, which do not preempt state tort lawsuits, do apply. Consequently, the Third Circuit should not have affirmed summary judgment.

C. This Court should abandon implied federal field preemption.

To the extent that lower courts have erred by interpreting *Napier* in its broadest sense, that error can be corrected by this Court's abandonment of the doctrine of implied federal field preemption. *Napier* expressed the prevailing view of this Court in the late 19th century and early 20th century that when Congress acted within its powers in enacting a statute, the states could no longer regulate within the field of that statute. This Court held that any remedy for inadequate regulation must be addressed to the ICC, the federal agency that regulated the railroads in 1926. *Napier*, 272 U.S. at 613.

Despite the broad language of *Napier*, until recently the case was regarded by this Court as a conflict preemption case. In the years following *Napier*, the states began to share responsibility for railroad regulation, with the acquiescence, if not the support, of the ICC. Although the repair and maintenance facilities of the railroads were instrumental in the safety of locomotives and rolling stock, the ICC never regulated them. The various states did, however, exercise authority over those facilities. By the time that the FRSA was enacted in 1970, many state regulations regarding railroad safety were on the books. [13]

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13. The view of this Court regarding federal preemption had changed dramatically by the time the FRSA was adopted. *Compare Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926), with *Terminal R. Ass'n v. Brotherhood of R. Trainmen*, 318 U.S. 1 (1943).

Petitioners attempted to persuade the Third Circuit that it should analyze the statutes and regulations involved in this case using the two-fold analysis this Court adopted in *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), but the Third Circuit rejected Petitioners' suggestion in a footnote. This case presents this Court with the opportunity to prevent such error going forward by replacing implied federal field preemption with the express preemption and conflict preemption analysis this Court adopted in *Wyeth*.

In *Wyeth*, this Court held that federal courts should not presume that preemption was intended unless Congress clearly showed its desire to preempt:

> Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers to the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting Rice v. Santa Fe Elevator Corp.*,

> 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).
>
> 129 U.S. at 1194-1195, 173 L.Ed. at 60. (emphasis added).[14]

Applying the *Wyeth* two-fold analysis to the instant case, the first question is whether Congress demonstrated an intent to preempt state product warning requirements in railroad shops. Such intent must be viewed against the absence of regulations on the subject issues by the FRA, and the FRA's specific intent not to issue regulations. There is no express statement of preemption in the statute. The second question is whether state law either conflicts with or thwarts congressional purpose, or whether state law makes it impossible for the Respondents to comply with both federal railroad regulations and state failure-to-warn products liability law. *Id.* at 1196-1200, 173 L.Ed. at 62-66.

In *Wyeth*, this Court noted that Congress stated a clear intent to preempt state court law on product

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14. The Third Circuit stated that *Wyeth* was a conflict preemption case, and therefore not controlling in a field preemption case. This Court has observed more than once that field preemption is but a species of conflict preemption. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 102 n.2 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 75 n.5 (1990). *Wyeth* itself relied on several field preemption cases, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963).

warnings on vaccines [16] and tobacco.[17] Here, neither Congress nor the FRA has ever expressed such an intent regarding warnings about the hazards of asbestos products in railroad repair shops.[18] The Third Circuit failed to specify any federal regulation that conflicted with the state law on which Petitioners' *failure-to-warn* claim is based. There is simply nothing in the United States Code or the Code of Federal Regulations remotely incompatible with a state requiring a warning label of the danger of asbestos on a product package. Under *Wyeth*, Respondents had the burden to demonstrate that compliance with state tort law on warnings on the use of hazardous products actually conflicted with federal purposes, or would make it impossible for them to comply with federal regulations. *Wyeth*, 129 S. Ct. at 1203-1204, 173 L.Ed. 69-70. The Third Circuit failed to perform this required analysis.

It is respectfully suggested that the instant case offers this Court the opportunity to provide clarity by

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16. 42 U.S.C. § 300aa-22(b)(1) (1987).

17. 15 U.S.C. § 1334(b) (2009).

18. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that even in areas of obvious field preemption, such as nuclear energy, state tort claims were not barred. Congress had to enact a specific statute in response to this Court's holding in *Silkwood* to preempt. Thus, in *Silkwood*, *Easterwood*, as well as in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court has consistently applied the presumption against preemption, and held that in the absence of federal statutory or regulatory issuances covering the area, there was no preemption, particularly of state tort claims for injury.

dispensing with the outmoded notion of implied federal field preemption in favor of express preemption and conflict preemption.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD P. MYERS
Counsel of Record
ROBERT. E. PAUL
1608 Walnut St., Suite 500
Philadelphia, PA 19103
(215) 735-9200
rpaul@prmpclaw.com

Attorneys for Petitioners
Gloria Gail Kurns and Freida E. Jung Corson

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC., et al.; BOC INC., Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP.

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 08-2216)
District Judge: Hon. Mitchell S. Goldberg

Argued January 11, 2010

Appendix A

Before: RENDELL, AMBRO, and CHAGARES, *Circuit Judges*

Filed September 9, 2010

OPINION

CHAGARES, *Circuit Judge.*

Appellants Gloria Gail Kurns and Freida E. Jung Corson brought suit on behalf of the decedent, George M. Corson, asserting a number of state law causes of action related to his alleged exposure to asbestos during his years employed by a railroad company. While the suit was filed in state court, the matter was removed to federal court on the basis of diversity jurisdiction, and the District Court granted the appellees Viad Corporation and Railroad Friction Products Corporation's motions for summary judgment, holding that the plaintiffs' claims were all preempted by the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.* ("LIA"). The plaintiffs appeal from the District Court's entry of summary judgment on behalf of the appellees and argue that their claims are not preempted by federal law. For the reasons set forth below, we will affirm.

I.

From 1947 to 1994, George M. Corson (the "decedent") worked as a welder, machinist, and supervisor for the Chicago, Milwaukee, St. Paul, & Pacific Railroad. He was employed at different facilities

in Montana and South Dakota. Much of his job involved removing insulation from locomotive boilers and putting brake shoes on the locomotives. The plaintiffs claim that throughout this time period, the decedent was repeatedly exposed to asbestos from the insulation and the brake shoes. After his retirement, the decedent was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. He passed away after the initiation of this litigation, and is represented by both his widow and the executor of his estate.

The plaintiffs sued the two appellees, as well as a number of other defendants (fifty-nine defendants in all), in Pennsylvania state court, seeking to recover compensatory and punitive damages for the harmful effects to the decedent's health resulting from his exposure to asbestos. The plaintiffs alleged that the decedent installed brake pads containing asbestos that were manufactured and sold by Railroad Friction Products Corporation ("RFPC"). They further alleged that Viad was a successor in interest to a different company that manufactured and sold engine valves, also containing asbestos, which the decedent installed. Viad moved for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law, but the state court denied that motion. All of the defendants then moved for summary judgment on the grounds that there was insufficient evidence linking their products to the decedent's exposure to asbestos. The state court granted these motions with regard to all of the defendants except Viad and RFPC.

Appendix A

The plaintiffs brought this case in state court because one of the other original defendants defeated diversity jurisdiction, but when the state court granted that defendant's motion for summary judgment and that party was released from the case, there was complete diversity of citizenship between the parties. At that point, Viad and RFPC removed the case to the District Court. Once in federal court, the defendants again filed a motion for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law.

On February 5, 2009, the District Court granted summary judgment in favor of RFPC and Viad, holding that the plaintiffs' state law product liability tort claims were preempted by federal law, namely the LIA.[1] The District Court held that the LIA occupies the field of regulating locomotives and locomotive parts used in interstate commerce based on the Supreme Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), in which the court explained that the LIA occupies the field

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1. The LIA provides, *inter alia*, that:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances —
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury.

49 U.S.C. § 20701.

of locomotive equipment.[2] The District Court rejected the plaintiffs' contention that federal law only preempted state regulations involving locomotives which were "in use" at the time, and that since their case involved the actual installation, repair, and removal of locomotive parts, federal preemption did not apply. The Court held that there was no indication in the law that Congress intended to make such a distinction. Finally, the Court rejected the plaintiffs' claim that the Federal Railroad Safety Act ("FRSA") materially abrogated the scope of federal preemption of the entire field of railroad parts. The Court held that the FRSA had not changed the scope of LIA preemption to such an extent that it would no longer preempt the plaintiffs' claims.

The plaintiffs filed a timely appeal from the District Court's order.

II.

The District Court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291. We review a district court's order granting summary judgment under a plenary standard of review. *Curley v. Klem*, 298

2. The District Court noted that other district courts in our circuit have reached similar conclusions. *See, e.g., Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (holding that the LIA preempts the field of locomotive equipment and therefore states cannot regulate speed recorders in locomotives), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982).

F.3d 271, 276 (3d Cir. 2002). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, we view all evidence in the light most favorable to the non-moving party, and will affirm only if there is no genuine issue of material fact. *Startzell v. City of Phila.*, 533 F.3d 183, 192 (3d Cir. 2008).

III.

On appeal, the plaintiffs contend that state law design defect and failure to warn product liability claims are not preempted by the LIA. The plaintiffs urge that the LIA preempts the regulation of locomotive equipment, but does not preempt "railroad workers' personal injury claims under state tort law for failure to warn about hazardous substances released during the repair of locomotives which [are] not in service." Plaintiffs' Br. at 19. We disagree and hold that the plaintiffs' claims are preempted by the LIA.

A.

We first turn to the plaintiffs' contention that the LIA does not preempt a state law or regulation related to working conditions in a facility that manufactures, installs, repairs, or removes locomotive parts and appurtenances.

Appendix A

The doctrine of preemption is grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI. Under that clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962). In cases like the present one, courts are called upon to determine whether an act of Congress preempts state law. *See Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. 2009).

There are three distinct types of federal preemption: express preemption, implied conflict preemption, and field preemption. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238-39 (3d Cir. 2009). Express preemption occurs when a federal law contains express language providing for the preemption of any conflicting state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). Implied conflict preemption occurs when it is either "impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941) (citation omitted)). The final type of preemption, which is relevant to this

case, is field preemption, which arises when a state law or regulation intrudes upon a "field reserved for federal regulation." *United States v. Locke*, 529 U.S. 89, 111, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (1990).

When determining whether a federal law or laws serve to preempt an entire field, "[o]ur inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)); *see also Deweese*, 590 F.3d at 246. In doing so, we consider the intended purpose of the federal regulatory scheme, and what impact any state regulation would have on that scheme. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). The Supreme Court has recognized that there is a presumption against field preemption unless congressional intent to preempt is clear and manifest. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

The LIA[3] was originally passed in 1911, and was amended in 1915 and 1924. In pertinent part, it provides

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3. The LIA was originally known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted throughout this opinion. We simply note that this is a distinction without a difference, and both terms refer to 49 U.S.C. § 20701, *et seq.*

that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances — (1) are in proper condition and safe to operate without unnecessary danger of personal injury . . . ." 49 U.S.C. § 20701. While the statute itself is silent as to any preemptive effect, one can easily understand how a state law or action which regulates whether a locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

The Supreme Court has explicitly addressed the question of the scope of LIA preemption. In *Napier*, the Court held that "the power delegated to the [Interstate Commerce] Commission[4] by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances."[5] 272

4. The LIA initially conferred regulatory authority over the construction and material of locomotives and appurtenances to the Interstate Commerce Commission. That regulatory authority has since been transferred to the Department of Transportation. 45 U.S.C. § 28.

5. In a later decision, the Court defined the scope of "every part of the locomotive and tender and of all appurtenances" as "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936).

(Cont'd)

U.S. at 611. The Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613 (emphasis added).[6] The Court also specifically noted that the delegation of powers to a federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers:

(Cont'd)

The plaintiffs urge that the LIA only governs "on the road injuries" and is irrelevant when a locomotive is not "in use." Plaintiffs' Br. at 20. The plaintiffs are correct that *liability* under the LIA only exists if the locomotive was in use at the time of the accident. *See Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). Here, however, the plaintiffs are not asserting or contesting liability under the LIA. But even if the fact that the locomotive parts and appurtenances that allegedly contained asbestos in the present case were not connected to a locomotive which was in transit at the time of exposure prevents the plaintiffs from bringing an action under the LIA, there are other federal causes of action available for such a claim, as discussed *infra*. This has no impact on the scope of preemption.

6. We are of course bound by a direct holding of the Supreme Court of the United States. To the extent that the plaintiffs argue that more recent decisions of the Supreme Court imply that the Court may now view this issue differently, we simply note that the Supreme Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

> It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.

Id. The Court also explicitly addressed the issue of congressional intent, holding that although the original LIA did not show that Congress intended federal law to preempt the entire field, it was clear from the law as amended that this was precisely what Congress intended. *Id.* at 611.[7]

Thus, the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation. *Id.* at 611-12; *see also Urie v. Thompson*, 337 U.S. 163, 191-93, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)

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7. The plaintiffs engage in a lengthy discussion of implied conflict preemption under *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). Implied conflict preemption occurs when Congress has not displaced all state law in an area, but state law actually conflicts with federal law. *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008). Because we find that field preemption under the LIA bars the plaintiffs' claims, we need not analyze implied conflict preemption.

(holding that the LIA covers claims relating to railroad employees' health, including diseases as well as accidents); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999) ("Through [the LIA] and other acts, [Congress] conferred on the Interstate Commerce Commission (and now the Department of Transportation) full authority over virtually all aspects of locomotive safety to the exclusion of the states."); *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1996) ("It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.").

Here, the brake pads and engine valves that allegedly caused asbestos exposure during installation are clearly locomotive equipment and are therefore within the scope of the LIA. *See Oglesby*, 180 F.3d at 461 (holding that an engineer's seat in a locomotive is obviously within the scope of the LIA). The plaintiffs concede that regulations regarding locomotive equipment are preempted by the LIA, but contend that this preemption does not bar state tort law product liability claims, including failure-to-warn claims, arising from the installation of locomotive parts. However, we find that the plaintiffs' claims "fall[ ] squarely within the field of employment hazards that the [LIA] was intended to cover." *Id.* at 462.

The goal of the LIA is to "prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Id.* at 461 (quotation marks

omitted); *see also Law*, 114 F.3d at 910 ("The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" (quoting *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Or.*, 9 F.3d 807, 811 (9th Cir. 1993))). In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts.[8] *See Oglesby*, 180 F.3d at 462 ("[T]he results that Congress had hoped to obtain through the [LIA] would be accomplished best by including the manufacturer within the statute's coverage.").

If each state had its own standards for liability for railroad manufacturers, equipment would have to be

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8. The plaintiffs also argue that even if this Court holds that their negligence and other state law claims are preempted by the LIA, their claim for failure to warn is not preempted because it involves a failure to place a warning label on some of the products in question, and does not directly involve the parts and appurtenances themselves. This is merely an attempt at artful pleading. The gravamen of the plaintiffs' claim is still that the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances. The plaintiffs may not merely rebrand a claim in order to avoid preemption. *See Oglesby*, 180 F.3d at 461 (rejecting a plaintiff's attempt to differentiate failure to warn cause of action from other product liability claims, calling it "a distinction without a difference"); *see also Law*, 114 F.3d at 910-13 (treating failure to warn claim as a product liability claim).

designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states. *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 880-81 (8th Cir. 1998); *Law*, 114 F.3d at 910-11; *cf. British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) (holding that if states were allowed to pass laws or regulations impacting the airline industry, "[t]he likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce"). Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state. *See Law*, 114 F.3d at 911. Furthermore, there is "no doubt" that the design of locomotive parts and warning requirements are within the scope of the Secretary of Transportation's authority. *Id.* As the Court of Appeals for the Ninth Circuit has observed:

> The [LIA] preempts any state action that would affect the "design, the construction, and the material" of locomotives. *Napier*, 272 U.S. at 611. Imposing tort liability on railroad equipment manufacturers would do just that, by forcing them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts — a result the [LIA] was clearly intended to foreclose.

Id. at 911-12.

While no federal court of appeals has faced the precise issue of whether the LIA preempts state law causes of action arising out of workplace exposure to asbestos in the course of manufacturing or working with railroad parts, the highest courts in a number of states have considered this issue, and those courts have unanimously held such claims to be preempted. *See, e.g., Darby v. A-Best Prods. Co.*, 102 Ohio St. 3d 410, 2004 Ohio 3720, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *In re W. Va. Asbestos Litig.*, 215 W. Va. 39, 592 S.E.2d 818, 822 (W. Va. 2003); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 176-80 (Ala. 2002); *Scheiding v. Gen. Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, 998-1004 (Cal. 2000). The Supreme Court of West Virginia, after conducting an exhaustive survey of the relevant case law, concluded:

> In spite of the strong presumption against federal preemption . . . . an overwhelming body of case law persuades us that, through passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively that plaintiffs' claims against the defendants are preempted. We do not reach this conclusion lightly, but find any other path blocked by an avalanche of adverse authority from other jurisdictions, both state and federal.

In re W. Va. Asbestos Litig., 592 S.E.2d at 822 (footnote omitted).

We agree with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption. In *Napier*, the Supreme Court clearly held that in its amendments to the LIA, Congress intended to preempt all state laws, regulations, and causes of action which involve "the design, the construction, and the material of every part of the locomotive and tender of all appurtenances." 272 U.S. at 611. The plaintiffs' claims undeniably involve the material used in locomotive parts, both of which fall under the definition of "parts and appurtenances" of locomotives, *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and therefore are preempted by federal law. *See Napier*, 272 U.S. at 611.

We agree with the District Court's determination that Congress's intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances, and that the locomotive components which are the subject of the plaintiffs' product liability action undoubtedly fall within that category.

B.

The plaintiffs urge that the LIA does not purport to encompass the field of safety in the manufacture of locomotives because the Occupational Health and Safety Act of 1970, 29 U.S.C. § 651, *et seq.*, governs working conditions in a repair shop. However, the plaintiffs' claims do not involve hazardous working conditions. Instead, the plaintiffs assert product liability claims (failure to warn and design defect claims) against the

manufacturers of certain locomotive parts that allegedly contained asbestos. "Working conditions" refers to the "environmental area in which an employee customarily goes about his daily tasks." *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (quotation marks omitted). We also note that the District Court pointed out the difference between claims involving railroad working conditions, *see Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943) (upholding an Illinois law requiring cabooses), and a claim, as here, emanating from the material used to construct locomotive parts.

Further, we note that federal law offers recourse to workers exposed to asbestos under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, which provides a federal cause of action for any railroad employee injured on the job due to employer negligence. Contrary to the plaintiffs' claims, LIA and FELA provide a broad, reasonable, and comprehensive legal framework under which railroad industry employees injured by employer negligence may seek damages. *See Law*, 114 F.3d at 912 (discussing the availability of claims brought under FELA as recourse for injuries suffered by railroad industry employees in the course of their employment). FELA has been recognized as the appropriate avenue of relief in several of the state supreme court cases discussed *supra*, which held that tort claims claiming asbestos exposure and seeking recourse under state law were preempted by the LIA. *See, e.g., In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, n.2; *Scheiding*, 993 P.2d at 1001.

C.

The plaintiffs also argued before the District Court, adopting the reasoning of the Pennsylvania Supreme Court in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), that the FRSA narrowed the scope of the LIA's preemption of state laws and regulations regarding locomotive equipment. We disagree.

The *Norfolk & Western* decision is the lone exception to the nearly unanimous interpretation of the breadth of LIA preemption. In *Norfolk & Western*, the Supreme Court of Pennsylvania rejected the assertion that the LIA completely preempted the field of railroad equipment. 489 Pa. 109, 413 A.2d 1037. The court held that "[w]hile the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 (FRSA) no longer permits that reading." *Id.* at 1043. Section 205, in relevant part, provided that "[a] state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary (of Transportation) has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The court held that in certain circumstances this statute enabled states to enact rules which regulated railroad safety.

Significantly, however, no court outside of Pennsylvania has followed this ruling or its reasoning. Just two years after *Norfolk & Western* was decided, in fact, a federal district court in Pennsylvania explicitly rejected *Norfolk & Western* as being incompatible with *Napier. Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982) (table opinion). That court, noting that the express purpose of the FRSA was to maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards, held:

> [I]n areas already governed by the Locomotive Inspection Act, the states had no regulations. If the Railroad Safety Act were to change the preemption test for those areas, the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law. This would run counter to Congress's purpose of uniform national regulation. It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced. Thus, I conclude that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act.

Id. at 656-57 (footnotes omitted). We similarly reject the reasoning of the *Norfolk & Western* court, and agree that *Napier* compels a holding of preemption.

As previously noted, when determining whether a state law cause of action is preempted, our "'ultimate touchstone'" is Congress's purpose in passing a certain law. *Altria Group, Inc.*, 129 S. Ct. at 543 (quoting *Medtronic, Inc.*, 518 U.S. at 485). While the plaintiffs assert that Congress's purpose in passing § 205 was to allow increased state regulation over railroad safety, this is flatly contradicted by the language of the statute itself, which provides that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a). The Act authorizes the Secretary of Transportation to "prescribe regulations and issue orders *for every area of railroad safety* . . . ." 49 U.S.C. § 20103(a) (emphasis added). We hold that in passing the FRSA, Congress did not intend it to disturb the existing framework of federal preemption of the railroad industry established by the LIA.

The FRSA has had no impact on the Department of Transportation's oversight of locomotive-related workplace safety issues. The Federal Railroad Administration ("FRA"), an agency within the Department of Transportation, has specifically investigated and addressed the question of asbestos in locomotive components, and concluded that the "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time." Federal Railroad Admin., U.S. Dep't of Transp., Rep. To Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) at 10-12.

Because the express purpose of the FRSA was to maintain, not decrease, federal uniform regulation of the railroad industry, we reject the rationale of the Supreme Court of Pennsylvania's *Norfolk & Western* opinion, and reject the plaintiffs' argument that the FRSA narrowed the scope of LIA preemption as it applies to product liability claims arising out of locomotive parts and appurtenances.

IV.

For these reasons, we will affirm the judgment of the District Court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSLVANIA FILED FEBRUARY 3, 2009

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KURNS, et al.,

Plaintiffs,

v.

A.W. CHESTERTON, et al.,

Defendants.

CIVIL ACTION NO. 08-2216

OPINION

GOLDBERG, J.

February 3, 2009

This case involves state law tort claims brought by plaintiffs, George Corson, and his wife, Freda Jung Corson, alleging that Mr. Corson had been exposed to asbestos products over the course of his twenty-eight year career as a machinist/welder for the Milwaukee

Road Railroad.[1] The lawsuit asserts that Mr. Corson, who passed away subsequent to the filing of the complaint, contracted mesothelioma through exposure to defendants' products.

Presently before the Court are defendants' Motions for Summary Judgment, which assert that plaintiff's claims for products liability and negligence are preempted by federal law.[2] Plaintiff contends that preemption does not apply and further argues that this Court is bound by a Pennsylvania state court's previous denial of summary judgment in this case. For the reasons stated herein, defendants' motions will be granted.

I. PROCEDURAL HISTORY

On June 13, 2007, plaintiffs initiated suit in the Philadelphia County Court of Common Pleas against fifty-nine defendants. On January 29, 2008, Mr. Corson died from mesothelioma, a cancer that his expert attributed to his lifelong occupational exposure to asbestos and asbestos-containing products. On May 13,

1. Mr. Corson was employed with Milwaukee Road Railroad (now Canadian Pacific Railroad) from January 1, 1947 - February 1, 1974. At all times he worked as a machinist/welder and was stationed in various cities within the state of Montana. (Pl.'s Complaint, p. 9).

2. Both defendants claim that plaintiff cannot identify their products as having been the source of asbestos exposure which contributed to plaintiff contracting mesothelioma. However, neither defendant included this argument in their Motions for Summary Judgment other than to preserve the issue.

2008, the case was removed to this Court. As the remaining plaintiff, Mrs. Corson seeks in excess of $ 50,000 in compensatory and punitive damages.[3]

Presently, the only remaining defendants are Railroad Friction Products Corporation [hereinafter "RFPC"] and Viad Corporation [hereinafter "Viad"]. Plaintiff alleges that RFPC manufactured/sold brake pads containing asbestos that were installed by plaintiff. Plaintiff further alleges that Viad was a successor in interest to Baldwin Locomotive, which manufactured/sold engine valves, also installed by plaintiff. The locomotive products plaintiff allegedly came in contact with - brake pads and engine valves, and the work plaintiff performed as a machinist/welder, are important factors in resolving the pending motions.

II. STANDARD OF REVIEW

This court must view the evidence presented by the parties in the light most favorable to the plaintiff, the non-moving party in this instance. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.* 974 F.2d 1358, 1363 (3d Cir. 1992). If, after examining "the pleadings, the discovery and disclosure materials on file, and any affidavits," the court finds there is "no genuine issue as to any material fact," then "the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving parties

3. Punitive damages in asbestos cases consolidated under MDL 875 in this District, have been bifurcated, and are not subject to adjudication at this time.

must carry the burden of showing that there is no genuine issue of material fact, entitling the defendants to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the defendants are able to meet their burden, the plaintiffs must go beyond the pleadings to set forth "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

A motion for summary judgment must be granted against a party that fails to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. If there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, summary judgment must be awarded to the moving party. *Id.*

III. DISCUSSION

A. Federal Preemption

Federal preemption is premised upon the Supremacy Clause of the United States Constitution, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted

the Supremacy Clause as invalidating all state laws that interfere with, or are contrary to, federal law. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1, 211, 6 L. Ed. 23), (1824)). As a result, a federal preemption analysis always starts with a question of congressional intent, and then proceeds to a discussion of state law interaction with the federal law or regulation. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). *See also Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ('[t]he purpose of Congress is the ultimate touchstone' in every preemption case).

Defendants RFPC and Viad maintain that they are entitled to summary judgment because Congress intended to occupy the field of regulation regarding locomotives and locomotive parts and equipment. Both defendants rely on the Boiler Inspection Act, 49 U.S.C. § 20701, (now known as the Locomotive Inspection Act, but historically referred to as the "BIA") as the statute that Congress intended to preempt all state law regulating locomotives and locomotive parts used in interstate commerce. (Defs. RFPC and Viad's Memo. of Law in Support of Mot. for Sum. J., pp. 2, 11).

In pertinent part, the BIA states: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances - (1) are in proper condition and safe to operate without unnecessary danger of

personal injury." 49 U.S.C. § 20701 (1994). The Supreme Court has held that the BIA (along with the "Safety Appliance Act"[4], or "SAA") was enacted to serve the congressional purpose of protecting "employees and others by requiring the use of safe equipment" in conjunction with the operation of railroads. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, at n.20 (1949).

In *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), the Supreme Court considered several state statutes regulating firebox doors and cab curtains in locomotive engines. The Court found that the state laws were preempted by federal law because Congress intended that the BIA would regulate "the equipment of locomotives." *Id.* at 612. The Supreme Court struck down the state law, reasoning that:

> [T]he power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.... We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

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4. Codified at 49 U.S.C. §§ 20301 *et seq*, the SAA regulates all rail cars, locomotives, tenders or similar vehicles. 49 U.S.C. § 20301(a) (1996).

Id. at 611-13. Here, because plaintiff alleges that Mr. Corson contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies.

Napier has been cited and relied upon by Judges in this District facing the same issue. For instance, in *D'Amico v. Garlock*, No. 92-5544, 2007 U.S. Dist. LEXIS 67664 at *2 (E.D. Pa. Sept. 13, 2007)(O'Neill, J), the plaintiff brought state common-law tort claims alleging that he contracted mesothelioma while working as a welder. Plaintiff contended that preemption was inapplicable, and argued that the BIA applied only to railroad carriers and not manufacturers. In reasoning that the preempted field extended to railroad manufacturers, the Court cited to *Napier* as preempting any state action that affects "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at *15 *quoting Napier*, 272 U.S. at 611.[5] The holding of *D'Amico* applies to the instant case, where the brake pads and engine valves at issue are "material" and/or "appurtenances" of a locomotive.

Napier was also relied upon in *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (Giles,

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5. The *D'Amico* decision also rejected the argument that the BIA only applies to locomotives which were "in use" and not "in the shop." *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *18-*19, (discussed *infra* at p. 8).

J.)[6] where a railroad sued the Pennsylvania Public Utility Commission seeking a declaration that a state statute regulating speed recorders and indicators in locomotives was preempted by the BIA and the Federal Railroad Safety Act. The state argued, as plaintiff does here, that federal laws passed after the BIA, such as the Railroad Safety Act, "redistributed railroad regulatory authority so that the total preemption test of the Locomotive Inspection Act [BIA] is no longer valid." *Id.* at 654. In interpreting *Napier*, the court rejected this argument and stated that "Congress intended the Locomotive Boiler Inspection Act to occupy *totally* the field of locomotive equipment." *Id.* at 655 (emphasis added). The court further stressed that validating the state regulation would be "contrary to Congress's purpose in passing the Railroad Safety Act." *Id.* at 657.

In an effort to deflect the holding in *Napier*, and precedent referenced above, plaintiff raises three arguments: 1) The Supreme Court case of *Terminal Railroad v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943), which involved railroad working conditions and decided after *Napier*, precludes preemption; 2) Because the BIA exclusively regulates locomotives "in use" and not in repair, preemption is not applicable; and 3) The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20144, (hereinafter "FRSA"), effectively repealed or restricted

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6. *Consolidated* was summarily affirmed by both the Third Circuit, 696 F.2d 981 (3d Cir. 1982), and the Supreme Court, 461 U.S. 912, 103 S. Ct. 1888, 77 L. Ed. 2d 280 (1983).

the BIA. These arguments are unpersuasive and addressed below.

First, plaintiff's reliance on *Terminal Railroad*, is misplaced because the state statute at issue there involved working conditions and not, as in this case, "parts" or "appurtenances." Specifically, in *Terminal Railroad*, an Illinois law required cabooses so that rear switchmen were not forced to ride the tops, sides or draw-bars of the rear cars. *Id.* The Court ruled that the Illinois law was a valid regulation, not subject to preemption as it involved the field of regulating working conditions. *Id.* at 8. These circumstances are much different than the facts before this Court which involve claims emanating from work with the material of locomotive parts, an area clearly preempted by Congress through the BIA. *See also*, *Urie v. Thompson*, 337 U.S. 163, 193, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (applicable standard of care under the Federal Employer's Liability Act ("FELA"), which creates a statutory remedy for workers harmed from working on locomotives, is determined under the BIA).

Plaintiff next argues that the BIA applies only to locomotives "in use," and not as in plaintiff's case, to locomotives or locomotive parts that are being repaired or prepared for use. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). The Honorable Thomas O'Neill, of this Court, addressed this issue in *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *1, noting that cases which define when a locomotive is "in use" stem from lawsuits brought under the BIA. *Id.*, *quoting Crockett v. Long Island*

R.R., 65 F.3d 274, 277 (2d Cir. 1995). In *D'Amico*, the "in use" distinction was found to be inapplicable to a preemption analysis because the plaintiff was seeking relief under state law, and not the BIA. Thus, Judge O'Neill properly concluded that "because the BIA preempts the entire field of locomotive equipment, the question of whether decedent was exposed to asbestos from locomotives in use or not in use is irrelevant." *D'Amico*, 2007 U.S. Dist. Lexis 67664 at *19. In fact, all of the cases cited by plaintiff in support of the "in use" argument deal not with state law claims but rather allegations brought against railroad companies under the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). As plaintiff is seeking relief pursuant to state law tort claims and not the BIA, the issue of whether the locomotive was "in use" or not is inapplicable.

Finally, plaintiff argues that the state law claims are not preempted because the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2007), overruled the *Napier*/BIA preemption test, and allowed state law to govern railroads and locomotives. (Pl.'s Answer to Viad's Mot. for Sum. J., p. 4). Additionally, plaintiff argues that the 2007 amendments to the FRSA[7] apply to this case, further chipping away at the field preempted by the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 4).

Plaintiff correctly notes that in undertaking to expand the field for federal regulation regarding railroad

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7. *Federal Railroad Safety Act*, 49 U.S.C. §20106 (2007) (Amendments effective in September 2007, specifically deemed retroactive from January 18, 2002).

safety, the FRSA announced a narrower rule governing preemption of state law.[8] *Consol. Rail Corp.*, 536 F. Supp. 653, 657 (1982). However, this rule stressed that a state may adopt certain regulations relating to railroad safety *as long as these regulations are "not incompatible with any Federal law."* 45 U.S.C. § 434 (emphasis added). This preemption language also emphasized that the "standards relating to railroad safety shall be nationally uniform to the extent possible." *Id.* Thus, while the FRSA did open the door to permit certain, discrete state railroad regulations, it did not, as plaintiff claims, overrule *Napier* or negate the basic principles of preemption that apply here.

In an attempt to bolster their argument that the FRSA precludes preemption, plaintiff relies heavily upon *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037, 1039 (Pa. 1980),

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8. The preemption section states:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standards, and when not creating an undue burden on interstate commerce. 45 U.S.C § 434.

where the Pennsylvania Supreme Court ruled that the BIA did not preempt a state law regulating sanitary disposal devices on locomotives. Plaintiff's reliance on *Norfolk & Western* is misplaced for several reasons.

First, *Norfolk & Western* involved the state's Public Utility Commission's ability to regulate a railroad's practice of discharging human waste on railroad tracks. *Id.* at 1039-40. This type of regulation has no relation to the case at hand, where plaintiff worked on locomotive brake pads and valves, both of which are "parts" falling squarely within the language of the BIA. *See D'Amico*, 2007 U.S. Dist. Lexis 67664 at *17-18.

Second, although the *Norfolk & Western* Court notes that the FRSA did narrow Congressional intent to preempt the field of railroad safety, the legislative history of the FRSA reflects that Congress did not intend to abrogate entirely the preemption doctrine under the BIA. Indeed, instead of repealing, recodifying, or subsuming the BIA when it passed the FRSA, Congress specifically determined that the BIA was working well and should remain in force without any changes.[9] *Consolidated Rail Corporation*, 536 F.Supp. at 656 (legislative history of FRSA reflects that

9. "Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others ... (the) Locomotive Inspection Act .... These particular laws have served well. In fact the committee chose to continue them without change." H.R. Rep. No. 91-114, 91st Cong., 2d Sess. 11, reprinted in 1970 U.S. Code Cong. & Ad. News 4104, 4108.

Congress intended no change to the BIA). Consequently, despite the holding in *Norfolk & Western*, the FRSA does not affect the scope of preemption announced in *Napier*.

Lastly, plaintiff is mistaken in asserting that the 2007 amendments to FRSA apply to this case. *See* H.R. Rep. No. 110-336, at 28 (2007), reprinted at 2007 WL 2745328 at *28. Plaintiff relies on the language in the amendments stating that FRSA "does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation." *See Id.* This isolated reference ignores, however, the fact that the amendments clearly were directed at the Minot, North Dakota, train derailment occurring on January 18, 2002.[10] In fact, the statute explicitly sets the effective date of the amendments as retroactive to January 18, 2002. *Id.* Because plaintiff's injuries were a result of "activities or events" occurring prior to January 18, 2002, the 2007 FRSA amendments are inapplicable to this case.[11]

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10. The amendments clarify that the FRSA (U.S.C. § 20106), as amended, applies to all pending state law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota, derailment.

11. In furtherance of the FRSA Amendment argument, plaintiff also relies on *DeFrancisco v. Owens-Illinois*, Docket No. CAM-L-1127-05 (N.J. Super. Ct., Camden Cty., June 2, 2008). There, the New Jersey Superior Court initially adopted the FRSA amendment argument plaintiff raises here. However, (Cont'd)

Appendix B

B. Coordinate Jurisdiction and Law of the Case

Plaintiff also argues that defendant Viad's Motion for Summary Judgment should be denied because Viad previously raised the preemption issue in a motion for summary judgment, which was denied, before removal to federal court, by the Honorable Alan L. Tereshko of the Philadelphia County Court of Common Pleas.[12] Judge Tereshko's ruling was delivered through a single sentence order, which simply denied the motion without any analysis or explanation regarding the basis of the ruling. (See, Pl.'s Answer to Viad's Mot. for Sum. J., Exhibit D). Plaintiff argues that, pursuant to the doctrine of coordinate jurisdiction, this Court must defer to Judge Tereshko's ruling because it is the prior holding of a coordinate court in the same case. *Id.* at 3.

(Cont'd)
that same court subsequently reversed its decision, admitting it had erred because it failed to take into account the 2002 effective date of the September 2007 amendment and the fact that the plaintiff's claims arose from exposure that ended in 1958. The court eventually held that the 2007 amendments to FRSA do not apply to injuries from exposure occurring before January 18, 2002.

12. While Defendant RFPC also filed a Motion for Summary Judgment before Judge Tereshko, that motion pertained to product identification and the issue of preemption was never raised. Thus, even if this Court were bound by Judge Tereshko's ruling, the "law of the case" would only apply to Viad and not RFPC.

Generally, plaintiff claims that the coordinate jurisdiction doctrine applies to coequal courts and stands for the proposition that "a court in the later phases of a litigated matter should not reopen questions decided by another judge of that same court . . . in the earlier phases of that matter." (Pl.'s Answer to Viad's Mot. for Sum. J., p. 3); *citing, Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326, 1331 (Pa. 1995). Therefore, plaintiff contends that because this Court's jurisdiction arises from the diversity of the parties, we are bound by the coordinate jurisdiction doctrine to follow Judge Tereshko's ruling. *Id. Citing, Erie v. Tompkins*, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In short, the crux of plaintiff's coordinate jurisdiction argument is that this Court must act as a Pennsylvania court and refrain from disturbing the state court's ruling. *Id.* Plaintiff's argument is flawed for several reasons.

First, the denial of a motion for summary judgment is an interlocutory order. *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000). Thus, if a district court has proper jurisdiction over the case, "it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973). Indeed, a federal district court, at any time prior to a final decree, may modify, open or set aside an interlocutory order of the state court. *See General Invest. Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 267, 43 S. Ct. 106, 67 L. Ed. 244, 1 Ohio Law Abs. 162 (1922); *Bon Air Hotel Inc., v. Time Inc.*, 426 F.2d 858, 862 (5th Cir. 1970); *Wolk v. Teledyne Indust. Inc.*, 475 F. Supp.2d 491, 507-8 (E.D.

Pa. 2007). In order for a federal district court to set aside the order of a state court and rule in the opposite, the court must have cogent and articulable reasons for doing so. *Preaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79 (9th Cir. 1979). For reasons expressed *infra*, cogent and articulable reasons to rule differently than Judge Tereshko exist.

We note that Judge Tereshko, as a Pennsylvania trial court judge, is bound by Pennsylvania Supreme Court precedent. As such, his ruling presumably afforded great weight to *Norfolk & Western Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), discussed above. This decision does not, however, constitute binding authority on this Court. In fact, two opinions from this Court decided after *Norfolk & Western* have applied preemption based on the BIA. *See D'Amico*, 2007 U.S. Dist. LEXIS 61664 at *20; *Consol. Rail Corp.*, 536 F. Supp. at 658. This Court's interpretation of the BIA, a federal law, and compelling federal court precedent necessitates the application of preemption. While Judge Tereshko's ruling was afforded great respect, the facts of this case nonetheless, fall squarely within the field preempted by the BIA.

Moreover, this Court is not bound by Judge Tereshko's ruling because a federal preemption analysis is governed by federal, not state law. *Grantham v. Avondale Industries, Inc.*, 964 F.2d 471, 473 (5th Cir. 1992). Plaintiff's assertion that the *Erie* doctrine mandates that we adopt Judge Tereshko's ruling is incorrect because the *Erie* doctrine "does not apply ...

in matters governed by the federal Constitution or by acts of Congress." *Id.* Indeed, federal courts "are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question." *Id.* As the issue before this Court does not pertain to state law, but rather, hinges on a question of federal preemption, we are free to independently adjudicate defendants' motions.

Finally, Judge Tereshko's ruling provides no basis or explanation for denying Viad's motion, or even the slightest hint as to the facts or law that were relied upon. Nonetheless, plaintiff asks us to discern Judge Tereshko's reasoning through application of a separate and distinct case, *Atwell v. Chesterton*, Philadelphia Court of Common Pleas, May Term, 2004, No. 1366, where Judge Tereshko denied summary judgment with an accompanying "FINDINGS and ORDER." Plaintiff argues that "it is likely" that Judge Tereshko's reasoning in the case before this Court is the same as *Atwell*. (Pl.'s Memo. of Law, p. 2). Following this logic would require a federal court, in applying federal law, to be barred by a state court ruling in a completely separate and distinct lawsuit. Given the clear guidance expressed in *Napier* and subsequent opinions from Judges of this Court applying preemption in similar situations, we are unwilling to take this far a leap. *See Core v. Southwestern Bell Tel.*, 673 F. Supp. 974, 979 (W.D. Ark. 1987)(federal court unwilling to reconsider state court ruling where state court provided absolutely no basis for its decision to deny the motion). *Federal*

Deposit Ins. Corp. v. First Mortg. Inv., 485 F. Supp. 445, 450 (E.D. WI. 1980) (federal court reconsidered state court's denial of motion for summary judgment based on the preliminary and scantily reasoned determination . . . by the state trial court).

IV. CONCLUSION

For the foregoing reasons, I grant both Viad and RFPC's Motions for Summary Judgment. Plaintiff's common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating locomotives, their parts and appurtenances. Furthermore, this Court, exercising its authority to reexamine Judge Tereshko's denial of summary judgment in state court, respectfully declines to follow Judge Tereshko's ruling. An appropriate order follows.

BY THE COURT:

_____

MITCHELL S. GOLDBERG, J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING RECONSIDERATION OF SUMMARY JUDGMENT ORDERS GRANTED IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS, DATED SEPTEMBER 11, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL SECTION – TRIAL DIVISION

CIVIL ACTION
NO.: 08-CV-2216

GLORIA GAIL KURNS, Executrix of The Estate of GEORGE M. CORSON, Deceased, and FREIDA E. JUNGE CORSON, Widow in her own right,

Plaintiffs,

vs.

A. W. CHESTERTON, INC., *et al.*,

Defendants.

ORDER

AND NOW, this 11th day of Sept, 2008, upon consideration of Plaintiffs' Motion for Reconsideration of Summary Judgment to Airco/BOC, and any

response(s) thereto, it is hereby **ORDERED** and **DECREED** that said Motion is hereby **DENIED** without prejudice as this Court is without jurisdiction over this matter.

BY THE COURT:

/s/
James T. Giles

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC, FILED OCTOBER 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC, Et Al.; BOC INC, Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*

Appendix D

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: October 5, 2010
PDB/cc: All Counsel of Record

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(2)

Supreme Court, U.S.
FILED
MAR 9 - 2011
OFFICE OF THE CLERK

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONSE OF VIAD CORP TO PETITION FOR A WRIT OF CERTIORARI

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

Attorneys for Respondent Viad Corp

QUESTION PRESENTED

Whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempts state-law tort claims concerning the design, manufacture, or material of locomotives or their parts, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926).

PARTIES TO THE PROCEEDING

Petitioners are Gloria Gail Kurns and Freida E. Jung Corson, named plaintiffs below.

Respondents are Railroad Friction Products Corporation and Viad Corp,* named defendants below.

RULE 29.6 DISCLOSURE

Respondent Viad Corp does not have a parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

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* Although sued as "Viad Corporation," respondent's correct name is "Viad Corp".

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INTRODUCTION

The Boiler Inspection Act (BIA)—first enacted in 1911, amended in 1915 and 1924, and now codified at 49 U.S.C. § 20701 *et seq.*—delegated to the Interstate Commerce Commission (and now delegates to the Secretary of Transportation) responsibility to assure the safety of "the locomotive or tender and its parts and appurtenances." *Id.* § 20701; *see id.* §§ 20701-20703.

In 1926, this Court considered the question whether a state may regulate any aspect of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," at least when there is no "conflict" between "the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 610-11 (1926). The Court's answer was unambiguous: "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613.

The court of appeals below, like every other federal court of appeals and every state court of last resort (save one) to have considered the question, followed *Napier*, and held that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a.

The court of appeals' decision is correct. The petition for certiorari nevertheless should be granted,

so this Court can affirm the court of appeals' judgment and conclusively resolve a division in the lower courts over the preemptive effect of the BIA and the continued vitality of *Napier*. Although *Napier*'s preemption holding governs in most jurisdictions, the Pennsylvania Supreme Court has refused to follow it. This split in authority has created an untenable situation for manufacturers of locomotive equipment. As this case illustrates, even out-of-state plaintiffs with out-of-state injuries can and do sue in Pennsylvania invoking that state's relatively lenient venue and personal jurisdiction rules. Thus, manufacturers can now effectively be made subject to the laws of 50 different jurisdictions (applied by Pennsylvania state courts in actions brought there), with applicable safety standards changing every time a locomotive crosses state lines. That is precisely the type of disuniformity Congress sought to eradicate through the BIA.

STATEMENT OF THE CASE

A. Statutory Background

1. Before the enactment of the BIA, "Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce." *Napier*, 272 U.S. at 608. The Safety Appliance Act did not "occupy the entire field of regulating locomotive equipment" because "its requirements are specific." *Id.* at 611.

In 1911, "Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment" by enacting the original BIA. Pub. L. No. 61-383, 36 Stat. 913. That delegation,

however, applied only to the locomotive's boiler. In 1915, Congress extended that delegation to "include the entire locomotive and tender and all parts and appurtenances thereof." Pub. L. No. 63-318, 38 Stat. 1192. The Act was again amended in 1924, Pub. L. No. 68-277, 43 Stat. 659, and remains unchanged in all relevant respects, except that regulatory authority was transferred from the Interstate Commerce Commission (ICC) to the Department of Transportation (DOT) in 1966. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931, 939.

2. The BIA—also known as the Locomotive Inspection Act (LIA)—currently delegates to the Secretary of Transportation authority to assure through regulation and inspection the safety of "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. The Act applies to "[w]hatever in fact is an *integral or essential part of a completed locomotive*," as well as "all parts or attachments definitely prescribed by lawful order" of the DOT. *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936) (emphasis added).[1]

The statute provides that a "railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... [1] are in proper condition and safe to operate without unnecessary danger of personal injury; ... [2] have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under

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[1] A "locomotive" is "a self-propelled unit of equipment designed primarily for moving other equipment," not including "self-propelled passenger cars." 49 C.F.R. § 223.5

this chapter; and ... [3] can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. § 20701. The Act broadly delegates to the Secretary authority to promulgate regulations concerning the safety of locomotives and locomotive equipment, and to assure compliance with those regulations. *Id.* §§ 20701-20702. The Secretary's authority under the BIA is not "confined to safeguarding against accidental injury," but also extends to "protection of employee health." *Urie v. Thompson*, 337 U.S. 163, 191, 193-94 (1949).

3. This Court addressed the BIA's preemptive scope in 1926 in *Napier*. Georgia and Wisconsin had attempted to impose their own particular requirements on the design of locomotives and their parts. 272 U.S. at 607. "The main question" presented was "one of statutory construction"—"whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.*

In answering that question, this Court "assumed" each state requirement "to be a proper exercise of its police power," and further "assumed ... there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only." *Id.* at 610-11 (footnote omitted).

The Court nevertheless found Congress's intention to preempt the state legislation "clearly manifested" (*id.* at 611) in the text, structure, and purpose of the BIA. The "power delegated to the Com-

mission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 613. Moreover, the fact that ICC regulations were not "inconsistent with the state legislation" made no difference, because the "fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *Id.*

The Court concluded that the BIA "was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Id.* at 613.

4. In 1970, Congress enacted the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971. The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress found that while the then-existing laws concerning railroad safety—including the BIA—"have served well" and should be "continue[d] ... without change," those laws "meet only certain and special types of railroad safety hazards." H.R. Rep. No. 91-1194, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Congress therefore expanded federal authority to all areas of rail safety, delegating to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C.

§ 20103(a). The FRSA did not, however, "subsume, replace, or recodify any acts," including the BIA. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.).

Congress also included in the FRSA a specific preemption provision, which was meant to assure that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130. The provision states in part that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The same section provides that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." *Id.* § 20106(a)(1).

6. In 1996, the Federal Railroad Administration (FRA)—the agency within DOT responsible for regulating railroad safety—reported the results of an investigation into the question of asbestos in locomotives and their parts. That report, which was ordered by Congress in 1992, determined that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf.

B. Factual Background and Procedural History

1. Between 1947 and 1974, George M. Corson was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad, and worked at various locomotive repair facilities in South Dakota and Montana. His duties included "removing insulation from locomotive boilers and putting brake shoes on locomotives." Pet. App. 3a. Corson allegedly contracted mesothelioma from his exposure to asbestos from the insulation and brake shoes. Viad is alleged to be the successor in interest of the company that allegedly manufactured the locomotives and boilers, while Railroad Friction Products Corporation (RFPC), the other respondent here, allegedly distributed the brake shoes (i.e., "parts and appurtenances" of the locomotive itself, 49 U.S.C. § 20701).

2. On June 13, 2007, Corson and his wife, Freida E. Jung Corson, filed a complaint against numerous defendants in the Court of Common Pleas of Philadelphia County, alleging state-law tort claims. Corson passed away during the pendency of the litigation, and the personal representatives of his Estate, Gloria Kurns and Freida Corson, were substituted as party plaintiffs and are the petitioners here.

Many of the defendants, including respondents Viad and RFPC, moved for summary judgment on various grounds. Viad's motion argued that Corson's state common-law claims were preempted by the BIA. The Common Pleas court denied Viad's and RFPC's summary judgment motions in a one-sentence order, although it granted summary judg-

ment as to several other defendants on other grounds.

3. On May 13, 2008, following the grants of summary judgment to some defendants and Corson's voluntary dismissal of others—including a Pennsylvania corporation whose presence in the case had precluded removal to federal court on the basis of diversity of citizenship, *see* 28 U.S.C. § 1441(b)—Viad and RFPC timely removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Viad and RFPC again moved for summary judgment on preemption grounds.

4. The district court granted the motion for summary judgment, citing *Napier*, *see* Pet. App. 25a-34a, and the Third Circuit affirmed. The court of appeals began with *Napier*, and its "hold[ing] that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field*. The broad scope of the authority conferred upon the Commission leads to that conclusion." Pet. App. 10a (quoting 272 U.S. at 613) (quotation omitted).

The "goal of the LIA," the court further explained, "is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" Pet. App. 12a (quoting *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999)). "In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the

LIA governs both the design and the construction of a locomotive's parts." Pet. App. 13a. "If each state had its own standards for liability for railroad manufacturers," the court emphasized, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." Pet. App. 13a-14a. "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." Pet. App. 14a.

The court of appeals therefore "agree[d] with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption," Pet. App. 16a, holding that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a (citing *Napier*, 272 U.S. at 611-12; *Urie*, 337 U.S. at 191-93).

The court of appeals rejected plaintiffs' reliance on the Pennsylvania Supreme Court's opinion in *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (1980), the only appellate court to hold that the BIA does not preempt the field of locomotive equipment safety. In particular, the court rejected the Pennsylvania court's view that the FRSA undermined this Court's field-preemption holding in *Napier*. Noting that the FRSA provides that "'[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practica-

ble,'" the court held that "Congress did not intend [the FRSA] to disturb the existing framework of federal preemption of the railroad industry established by the LIA." Pet. App. 20a (quoting 49 U.S.C. § 20106(a)) (first alteration and omission in original).

5. While this case was pending in the court of appeals, an intermediate Pennsylvania appellate court held in two cases that the BIA does not preempt the field of locomotive equipment safety. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009); *see also Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (relying on *Atwell*). The Pennsylvania Supreme Court denied review. *See Atwell v. John Crane, Inc.*, 996 A.2d 490 (Pa. 2010) (pet. for cert. filed, No. 10-272, August 26, 2010); *Harris v. A.W. Chesterton, Inc.*, 3 A.3d 671 (Pa. 2010) (pet. for cert. filed, No. 10-520, October 19, 2010). The defendants in both cases have petitioned this Court for certiorari. The Court called for the views of the Acting Solicitor General in *John Crane, Inc. v. Atwell*, 131 S. Ct. 552 (2010) (No. 10-272). The Court has not acted on the petition in *Griffin Wheel Co. v. Harris*, No. 10-520, which was distributed for the Conference of December 10, 2010.

ARGUMENT

The court of appeals correctly concluded that petitioners' tort claims are preempted by the BIA, and correctly adhered to this Court's decision in *Napier*. This Court should grant certiorari and affirm that judgment. The holding below is supported not only by *Napier*, but by an "avalanche of ... authority from other jurisdictions, both state and federal." *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va.

2003). The contrary view adopted by the Pennsylvania courts, however, has created an untenable situation for locomotive equipment manufacturers, which now can be forced to defend themselves in Pennsylvania courts under safety standards that vary throughout the Nation. Viad therefore agrees with petitioners that review of the question presented by this case is warranted. Viad also agrees with petitioners (Pet. 3 n.4) that of the three petitions for certiorari currently pending before the Court, this case is the best vehicle through which to consider the question presented.

A. The Court of Appeals Correctly Held that the BIA Preempts State Requirements Concerning the Design or Manufacture of Locomotives or Their Parts

1. "It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment." *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). Thus, like the court of appeals, every appellate court—other than the Pennsylvania courts—to have considered the question has held that the BIA preempts the field of safety regulation of locomotives and their parts, including claims arising out of exposure to asbestos found in locomotive parts. *See Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Oglesby v. Del. &*

Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim against manufacturer of seats is preempted by the BIA); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for lack of visual devices on a train brought against owner of train and its manufacturer is preempted by the LIA); *Darby v. A-Best Prods. Co.*, 811 N.E. 2d 1117, 1125-26 (Ohio 2004) (finding that the BIA "preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives"); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003) (BIA preempts state tort law claims against manufacturers of locomotives and asbestos-containing parts and components thereof); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts and failure to warn); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (BIA preempts railroad workers' design defect and failure to warn claims against manufacturer for asbestos-related injuries); *see also Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983).

This "avalanche of ... authority," *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, is hardly surprising. It follows directly from this Court's unambiguous holding in *Napier* that "the Boiler Inspection Act ... was intended to occupy the field" of regulation concerning the "design, the construction, and the mate-

rial of every part of the locomotive and tender and of all appurtenances," irrespective of whether any federal safety standard is "inconsistent with the state legislation." 272 U.S. at 611, 613; *see also S. Ry. Co.*, 297 U.S. at 402.[2]

The reason for broad field preemption in this area is clear. It "is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" *Law*,

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[2] Petitioners appear to contend that *Napier*'s mention of "state *legislation*" means that state common-law tort rules do not fall within the BIA's preemptive scope. Pet. 15-16. *Napier* mentioned "state legislation" because state legislation was at issue there. The argument that the BIA should be read to preempt only a state's statutory and regulatory requirements, and not its common-law requirements, is unavailing. As this Court has repeatedly explained, state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S 236, 246-47 (1959); *see, e.g., Riegel v. Medtronic, Inc.*, 552 U S. 312, 324 (2008), *Buckman v. Plaintiffs' Legal Comm* , 531 U.S 341, 352 (2001); *Geier v. Am. Honda Motor Co* , 529 U S. 861, 868-69, 872 (2000); *Norfolk S. Ry. Co v. Shanklin*, 529 U.S 344, 358 (2000); *Cipollone v Liggett Grp., Inc.*, 505 U.S. 504, 521-23 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S 481, 491 (1987). State tort claims thus interfere with the federal scheme just as surely as state legislation does, and they are preempted for the same reason.

114 F.3d at 910 (quoting *S. Pac. Transp. Co. v. Or. Pub. Util. Comm'n*, 9 F.3d 807, 811 (9th Cir. 1993)). Indeed, "[i]f each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11. *See also Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.) (three-judge court) (*Napier*'s "decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them").[3]

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[3] Even though state common-law claims concerning the design and manufacture of locomotive equipment are preempted, railroad workers injured on the job are not necessarily left without a remedy. *See Law*, 114 F 3d at 911-12. The Federal Employers' Liability Act (FELA) permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R R.*, 352 U S. 500, 506 (1957); *see* 45 U S.C. § 51 *et seq* And a worker can establish negligence per se under FELA by establishing a violation of the BIA or other rail safety statute *Urie*, 337 U S at 189. It is true that negligence per se applies only to injuries suffered while the train was "in use," *see, e g , Brady v. Terminal R.R. Ass'n*, 303 U S. 10, 11-12 (1938), and thus would not cover injuries (like Corson's) suffered while a train was in the repair shop. Pet. 24-25. But those injuries still could be remedied in a simple negligence action under FELA—the plaintiff would lose only the benefit of the special negligence per se theory. *See, e.g., Wright v. Ark. & Mo. R R. Co.*, 574 F.3d 612, 614 (8th Cir. 2009).

2. Despite this Court's clear precedent, the overwhelming weight of precedent in the state and federal courts, and the undeniable need for uniformity in the area of locomotive equipment, petitioners—and the Pennsylvania courts—argue that their state common-law claims alleging injuries allegedly sustained from the design or manufacture of locomotive parts may proceed. Petitioners' arguments are without merit.

a. Petitioners argue that this Court's subsequent precedents narrowed *Napier*, but those cases construed not the BIA, but the Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.*, which grants federal regulatory authority over specific aspects of the rail car and locomotive.[4] Pet. 16-21. The SAA precedents are inapposite. While the SAA grants federal regulatory authority over specific aspects of the rail car and locomotive, the BIA delegates to the Secre-

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Petitioners cite a string of FELA cases ostensibly showing that the BIA does not "appl[y]" to repair-shop-type claims (like Corson's) and thus cannot preempt such claims Pet. 25 Those cases have nothing to do with preemption of state law. They address the question *under FELA* of "at what point the railway becomes absolutely liable for injuries caused by defective equipment under the Act." *Angell v. Chesapeake & Ohio R.R. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). The answer under FELA—i.e., when the trains are "in use" such that a violation of the BIA (or other federal railroad safety laws) establishes negligence per se in a FELA action—is irrelevant to the question whether the BIA's delegation of federal authority to regulate locomotive equipment design and manufacture preempts state-law claims that seek to regulate the same field

[4] Rail cars are distinct from locomotives *See, e g*, 49 C F R § 232 407(a)(2) (defining "[t]rain" generally to mean "one or more locomotives coupled with one or more rail cars").

tary authority over the entire locomotive and its parts and appurtenances. There is no dispute that this case falls within the BIA's scope. And while petitioners treat the SAA and BIA as one—referring to them as the "railroad safety acts," *see, e.g.*, Pet. i—this Court has already held that their preemptive scope is not the same. As *Napier* itself explained, the SAA does not "occupy the entire field of regulating locomotive equipment" because, in contrast to the BIA, "its requirements are specific." 272 U.S. at 611.

Petitioners cite no cases *under the BIA* undermining the preemption rule enunciated in *Napier*. There are none. To the contrary, this Court expressly *reaffirmed* the holding of *Napier* more than 20 years later. *See Urie*, 337 U.S. at 192.[5]

This conflation of the two Acts leads petitioners not only to rely on the wrong precedent, but more broadly to misconceive the legal question implicated in this case. Respondents did not seek summary judgment on the basis of the SAA, and the court of appeals did not consider that question below. Thus,

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[5] Petitioners—like the Pennsylvania Supreme Court in *Norfolk & Western*—rely on *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942), as having narrowed *Napier*, Pet. 36 n.13, but that case is inapposite. *Trainmen*, which did not cite *Napier*, concerned whether a railroad must supply its employees with cabooses to ride in. 318 U.S. at 2-3. A caboose is "a car in a freight train intended to provide transportation for crewmembers," 49 C.F.R. § 223.5—not a locomotive—and the case did not involve the "design, the construction, [or] the material of [a] part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. And *Urie* reaffirmed *Napier*'s holding seven years after *Trainmen*.

the question here is not whether petitioners' tort claims are preempted by "the federal railroad safety acts," as their question presented states (Pet. i), but whether those claims are preempted *by the BIA in particular*. And contrary to petitioners' suggestion, respondents do not argue (and have never argued) that the BIA precludes "all state regulation of railroad safety." Pet. 19. Respondents only argue (and the court below only held) that the BIA preempts state law concerning the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," per *Napier*. 272 U.S. at 611.[6]

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[6] Petitioners place significance on the FRA's 1978 statement that the Occupational Safety and Health Administration (OSHA) should take a lead role in regulating many aspects of "railroad occupational safety and health." 49 C.F.R. § 221 (1978). Petitioners appear to take this statement to mean that this case should be governed by OSHA's organic statute, which contains a savings clause. *See* 29 U.S.C. § 653(b)(4). But petitioners do not and could not argue that this case falls outside the bounds of the BIA, *viz.*, the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," *Napier*, 272 U.S. at 611, and there is no plausible argument that OSHA's savings clause was intended to impliedly repeal the BIA's preemptive scope. Further, the FRA's statement concerning OSHA's responsibilities specifically emphasized that FRA would retain responsibility over "hazardous working conditions in those traditional areas of railroad operations in which we have special competence." 49 C.F.R. § 221 (1978). And the preamble accompanying the regulation explicitly reaffirmed that it is FRA—not OSHA—that retains primary jurisdiction over "the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations." Railroad Operational Safety &

b. Petitioners also argue that the saving clause in the preemption provision of FRSA, enacted in 1970, overrides BIA preemption and preserves all state-law claims in the absence of a directly conflicting federal regulation. Pet. 26-33. The FRSA provision states that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). That provision has no bearing the scope of preexisting BIA preemption.

Before 1970, federal regulation of railroad safety was not plenary, but was limited to "certain and special types of railroad safety hazards," like locomotive equipment (BIA) and rail car (SAA) safety. H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. Congress enacted the FRSA to "promote safety in *every* area of railroad operations." 49 U.S.C. § 20101 (emphasis added). Accordingly, Congress delegated to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety *supplementing laws* and regulations"—like the BIA—"in effect on October 16, 1970." 49 U.S.C. § 20103(a) (emphasis added).

As the statute makes clear, the FRSA was meant to supplement the BIA and other then-existing statutes, not to alter or amend such statutes. Indeed, as then-Judge Kennedy explained, the FRSA did "not subsume, replace, or recodify any acts." *Marshall v.*

Health Standards; Termination, 43 Fed. Reg. 10,583, 10,587 (Mar 14, 1978).

Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983). To the contrary, Congress believed that then-existing laws like the BIA "have served well" and should be "continue[d] ... without change." H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. "The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Marshall*, 720 F.2d at 1153. The FRSA's preemption provision thus allows states to continue to regulate in areas where states have always regulated until the federal government says otherwise, but has no effect on areas previously preempted by federal law, like regulation of locomotive equipment.[7]

Petitioners' contrary reading would violate the "cardinal rule ... that repeals by implication are disfavored." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)) (quotation omitted; omission in original). And it would undermine the FRSA's express command that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent prac-

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[7] *Marshall*'s analysis is supported by the FRSA's legislative history. The preemption provision was meant to assure that "*[e]xisting* state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130 (emphasis added). But there were no "existing" state rules "in force" concerning the design and manufacture of locomotives and their parts in 1970, because this Court had held the BIA to have preempted that entire field in *Napier*.

ticable." *Id.* § 20106(a)(1); *see also* H.R. Rep. No. 91-1194, at 12, *reprinted in* 1970 U.S.C.C.A.N. at 4116 ("[I]t is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable"). Granting federal regulatory authority over areas of railroad safety previously outside the bounds of federal authority went a long way toward accomplishing that goal compared to what came before, even though some interstitial state regulation would remain. But allowing states to regulate in an area where they had *not* regulated before—like the design and manufacture of the locomotive and its parts—would undermine rather than further the purpose of federal uniformity.[8]

c. Finally, petitioners urge this Court to "abandon[] the doctrine of implied federal field preemption," Pet. 36, and instead apply the conflict preemption principles set forth in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). This Court should decline petitioners' invitation.

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[8] Petitioners also rely on a later-enacted portion of the preemption provision, 49 U.S.C. § 20106(b)(1), which states that "[n]othing in this section be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party" "has failed to comply with" a federal standard, "its own plan, rule, or standard that it created pursuant to" an order of a federal regulator, or "with a State law, regulation, or order that is not" preempted under subsection (a). But that provision does not apply to "causes of action arising from events or activities occurring [before] January 18, 2002," *id.* § 20106(b)(2), far after the relevant events in this case are alleged to have taken place. And petitioners' claims do not allege that respondents violated any federal standard or any state "law, regulation, or order." They instead assert that respondents violated state common-law requirements.

To begin, nothing in *Wyeth* undermines this Court's long-standing view that "[p]re-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). *Wyeth* was purely a conflict preemption case, *see* 129 S. Ct. at 1194, as the defendant had abandoned its field preemption argument before the lower court, *id.* at 1192, and did not call into question the long-recognized doctrine of field preemption.

Petitioners' call to abandon *Napier* is particularly unsound because that decision "is one of statutory construction," 272 U.S. at 607, and "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Congress has not altered the BIA in any relevant way since *Napier* was decided in 1926. And even if *Wyeth* did "represent a turn in the course of the law" of field preemption, *id.* at 138—which it did not—this Court has repeatedly rejected abandoning its statutory interpretation precedent, irrespective of whether it would decide the case the same way today. *See, e.g., id.* at 138-39; *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008).[9]

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[9] Even if the conflict-preemption principles of *Wyeth* did apply here, the judgment of the court of appeals should be affirmed. First, *Wyeth* relied in large part on the presumption against preemption. 129 S. Ct. at 1194-95. But that presumption does not apply where, as here, the field historically has

In sum, the court of appeals correctly found that the BIA preempts the field of locomotive equipment regulation, as this Court held in *Napier*.

B. Certiorari is Nonetheless Warranted Because Rulings from the Pennsylvania State Courts Directly Conflict with the Decision Below on This Recurring Issue of National Importance

1. Contrary to the "avalanche" of federal and state court precedent discussed above, the Pennsylvania Superior Court—an intermediate state appellate tribunal—recently held in two cases that state

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been dominated by federal rather than state regulation. *See United States v. Locke*, 529 U.S. 89, 99 (2000). State regulation of locomotive equipment has been wholly preempted since *Napier* was decided in 1926. And Congress's refusal to amend the BIA in the more than eight decades since *Napier* suffices to manifest its intent to preempt state regulation of locomotive equipment.

Further, there is "clear evidence," *Wyeth*, 129 S. Ct. at 1198, that allowing state tort claims based on asbestos exposure would conflict with the federal regulatory scheme. In particular, contrary to petitioners' assertion that "the FRA has never addressed asbestos," Pet. 34, the FRA expressly decided *not* to regulate asbestos in locomotives. In a September 1996 Report to Congress—mandated by Congress four years earlier—the FRA found unequivocally that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf. Thus, even if petitioners were correct and *Napier*'s overall field-preemption holding is no longer good law, petitioners' asbestos-related claims would still be preempted

tort law claims of railroad workers are not preempted by the BIA. In *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), the Pennsylvania Superior Court rejected BIA preemption of state common-law claims, following the Pennsylvania Supreme Court's 1980 decision in *Norfolk & Western* that the BIA did not preempt the field of the design and manufacture of locomotives and their parts. The reasoning in *Atwell* was subsequently adopted *in toto* by *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010).

Despite the urging of the Superior Court,[10] the Supreme Court of Pennsylvania declined to hear appeals in both cases. *Atwell*, 996 A.2d 490; *Harris*, 3 A.3d 671. As a result, and despite more than two dozen appellate decisions from other jurisdictions since *Norfolk & Western* that have found BIA field preemption in the circumstances here presented, the Pennsylvania state courts will continue to follow that decision unless constrained by this Court.

This division in authority is intolerable. Railroads and locomotive equipment manufacturers will be subject not only to Pennsylvania standards, but also to the standards of any other state whose law might apply in an action brought in a Pennsylvania

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[10] *See Atwell*, 986 A.2d at 894 n.9 ("The decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it.")

court.[11] That is precisely the result Congress wished to avoid when it enacted the BIA.

2. The issues raised by this petition are both pressing and recurring, as the large number of courts to have already considered the question presented demonstrates. Indeed, hundreds of cases involving similar issues are pending in the Multi-District Asbestos Litigation Part for the Eastern District of Pennsylvania.

This backlog of cases is likely to grow in the future, as the conflict created by the Pennsylvania state courts encourages plaintiffs to forum-shop their claims into the Pennsylvania courts. Plaintiffs certainly will do their utmost to find a basis for commencing their cases in Pennsylvania state court and for immunizing their pleadings from removal. Under Pennsylvania law, a plaintiff may bring an asbestos-related tort claim in the state's courts, even if no part of the claim arose in the state, so long as the defendant "regularly conducts business" in the county in which the suit is filed. Pa. R. Civ. P. 2179(a)(2) (governing venue for claims against corporations). And because Pennsylvania is a hub for the railroad industry, most railroad operators and locomotive parts manufacturers regularly conduct business in the state. As a result, a disproportionate number of future claims are likely to be brought in Pennsylvania and allowed to proceed because of that

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[11] The question whether the BIA preempts state law is itself a question of federal law, not state law, and Pennsylvania courts will therefore continue to apply their view of federal preemption, even if another state's substantive law applies as the rule of decision

state's courts' anomalous and incorrect interpretation of the BIA's preemptive scope.

C. This Case Presents the Most Appropriate Vehicle to Decide the Question Presented

Of the three petitions under consideration for review by this Court, this one provides the best vehicle for resolution of this important issue. Counsel for the petitioners here, who also represents the respondents in *Atwell* and *Harris*, agrees that "the issue is better presented in the instant case." Pet. 3 n.4.

The petition here presents the question of BIA preemption in a clean factual and legal context. Viad's alleged predecessor in interest manufactured the locomotive itself and its boilers—the very equipment at the heartland of the BIA. The defendants in *Atwell* and *Harris* supplied only gaskets and brake shoes, which could raise factual questions about application of the BIA. The *Atwell* trial court, in fact, found that the parts at issue there are not "appurtenances" of a locomotive under the BIA. *Atwell*, 986 A.2d at 892. And the *Harris* petitioners added the preemptive scope of the SAA to their question presented (*Griffin Wheel Co. v. Harris*, No. 10-520, Pet. for Cert. at i), potentially diluting the focus on BIA preemption and the continued vitality of *Napier*.

Further, the *Atwell* opinion issued by the Pennsylvania Superior Court rests almost entirely on the precedential effect of *Norfolk & Western*, a three-decade old Pennsylvania state court decision that predates and is inconsistent with the settled law of all other jurisdictions, and includes little independent analysis of current case law. And there is no

opinion in *Harris*, merely a citation to *Atwell*. The Third Circuit's opinion in this case, by contrast, reflects a comprehensive and careful analysis of the issues—a much better framework for evaluating the question common to all three cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

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No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com
Counsel for Respondent Railroad Friction Products Corporation

QUESTION PRESENTED

Whether the Court of Appeals correctly held, in conformity with this Court's reasoning in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), and an "avalanche" of decisions from both federal and state reviewing courts, that the Locomotive Inspection Act, 49 U.S.C. § 20701, et seq., preempts Petitioners' state tort claims involving the design, construction, and safety of railroad equipment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The plaintiffs are Gloria Gail Kurns, the executrix of the estate of the late George M. Corson, and Frieda E. Jung Corson, the widow of George M. Corson.

The defendants are Railroad Friction Products Corporation ("RFPC") and Viad Corp ("Viad"). All other named defendants were dismissed from the action prior to the decision below.

RFPC is wholly owned by RFPC Holding Corporation, which is wholly owned by Westinghouse Air Brake Technologies, d.b.a. Wabtec Corporation. There is no parent or publicly held corporation owning 10% or more of Westinghouse Air Brake Technologies.

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In the Supreme Court of the United States

No. 10-879

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

1. For more than a hundred years, the federal government has regulated almost every aspect of the railroad industry, including railroad equipment, safety, labor relations, and working conditions. *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982).

In particular, for the safety of railroad employees, this federal regulation has extended to all aspects of the design, construction, material, and maintenance

of locomotives and railcars. Thus, in 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), currently codified at 49 U.S.C. § 20301, et seq. Later, in 1911, Congress enacted the Boiler Inspection Act ("BIA"), now known as the Locomotive Inspection Act ("LIA") and currently codified at 49 U.S.C. § 20701, et seq.[1]

Additionally, early in the twentieth century, Congress passed the first Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. § 51, et seq., giving railroad employees injured on the job federal remedies against their employers. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

The SAA and LIA were enacted with the same Congressional purpose—to protect railroad workers by ensuring that railroad equipment is not unreasonably dangerous—and they are read in *pari materia* with one another and with FELA, which provides for the enforcement of the SAA and LIA and the redress of work-related injuries. *Urie v. Thompson*, 337 U.S. 163, 190 (1949).

Through all of these acts, Congress has created a comprehensive system for the federal regulation of the design, construction, and safety of railroad equipment, including parts and appurtenances, used in interstate commerce, and it has conferred on the

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[1] The LIA originally was known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted in the Court of Appeals' opinion and in this response. References to the LIA or BIA refer to the same statute, 49 U.S.C. § 20701, et seq.

Interstate Commerce Commission (and now the Secretary of the Department of Transportation and his delegate, the Federal Railroad Administration ("FRA")) virtually exclusive authority over railroad safety. *See Southern Ry. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439, 444-48 (1915) (preemptive effect of the SAA); *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926) (preemptive effect of the BIA); *Urie v. Thompson*, 337 U.S. at 182, 188-89 (SAA and BIA work together to regulate safety).

The SAA and LIA and their accompanying federal regulations were supplemented in 1970 by the Federal Railroad Safety Act ("FRSA"), now codified at 49 U.S.C. § 20101, et seq. The FRSA gives broad powers to the Secretary of Transportation to prescribe regulations and issue orders "for every area of railroad safety supplementing [the SSA and LIA and accompanying regulations]." 49 U.S.C. § 20103(a).

2. This pervasive federal regulatory scheme carries legal consequences for actions brought under state law as well. In *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. at 613, this Court first addressed the LIA's preemptive effect on state law. It specifically held that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. This Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it,*

was intended to occupy the field." *Id.* at 613 (emphasis added).

Consistent with the reasoning in *Napier*, the LIA occupies the regulatory field relating to railroad equipment used in interstate commerce and preempts state laws insofar as they would regulate the design, construction, and safety of such equipment.

3. On June 13, 2007, George M. Corson and Frieda E. Jung Corson brought this products liability action against RFPC, Viad, and others in the Philadelphia County Court of Common Pleas for compensatory and punitive damages for the harmful effects to Mr. Corson's health resulting from his alleged exposure to asbestos when installing brake shoes and engine valves on locomotives and railcars. App. 2a-4a, 23a-24a.[2]

Several of the joined defendants moved for summary judgment on various grounds. The state court granted these motions with regard to all of the

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[2] Viad allegedly is the successor in interest of a company that manufactured the locomotives and boilers and RFPC allegedly is a distributor of brake shoes—i.e., "parts and appurtenances" that are used interchangeably on locomotives and railcars.

Mr. Corson died on November 17, 2007. Gloria Gale Kurns, the daughter of Mr. Corson and executrix of his estate, subsequently was substituted as a plaintiff. App. 3a, 23a. Contrary to the Petition at 11 n.1, RFPC has not conceded that there was any causal connection between any brake shoe product that it distributed and any injury to Mr. Corson

defendants except RFPC and Viad. App. 3-4a, 23a-24a.

4. The state court's summary judgment order dismissed the single Pennsylvania defendant whose presence had precluded removal under 28 U.S.C. § 1332. RFPC and Viad subsequently removed the case to federal district court. App. 5a, 23a-24a.

5. Once in federal court, RFPC and Viad moved for summary judgment based on the LIA's preemptive effect. App. 4a-5a, 23a-24a. On February 5, 2009, the district court granted those motions, holding that the LIA preempted Petitioners' state law product liability claims. App. 4a-5a, 23a-24a. Petitioners appealed, and, on September 9, 2010, the Third Circuit Court of Appeals affirmed. App. 1a-21a.

6. Petitioners then sought rehearing and rehearing en banc, and their petition was denied. A timely petition for a writ of certiorari followed. App. 42a-43a.

REASONS FOR DENYING THE WRIT

The *Kurns* petition should be denied because the Court of Appeals' decision does not implicate any irreconcilable conflict of authority among the federal circuit courts of appeals or state courts of last resort. Rather, that decision is consistent with this Court's precedents and an "avalanche" of decisions in federal and state courts establishing the LIA's preemptive effect on state law claims relating to the design, construction, and safety of railroad equipment, including parts and appurtenances used on locomotives and railcars. In addition, that decision does not raise any concerns, real or imagined, about the LIA's preemptive reach.

I. There Is No Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

This is one of three cases presently pending in this Court that raise the same question about whether the LIA preempts state common law and statutory tort claims by workers allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. The other petitions are *Atwell v. John Crane, Inc.*, No. 10-272 (petition filed Aug. 23, 2010), and *Griffin Wheel, Inc. v. Harris*, No. 10-520 (petition filed Oct. 12, 2010).[3] The question presented in these petitions does not merit further review by this Court because there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach.

In *Napier*, 272 U.S. at 611-13, this Court addressed the scope of LIA preemption and held that the LIA occupies a broad field of regulation relating to the design, construction, selection, installation, and maintenance of "every part of the locomotive and tender and of all appurtenances" and preempts state laws insofar as they seek to regulate the same subject matter for the safety and welfare of railroad workers.

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[3] The Court has called for the Acting Solicitor General's views in *Atwell*, *see* 131 S.Ct. 552 (2010) The Court has not acted on the petition in *Harris*, which was distributed for the Conference of December 10, 2010.

This Court repeatedly has reaffirmed the reasoning and holding of *Napier*, most recently by implication via a 1983 memorandum decision affirming the judgment in *Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n. See U. S. v. Baltimore & O. R. Co.*, 293 U.S. 454, 459 (1935) (under the LIA, the federal regulator "clearly" has authority to regulate "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances").[4]

Moreover, in the 80 years since *Napier*, it has been settled that the LIA occupies the field of regulation relating to, and preempts state law claims arising from, the design, construction, and safety of all railroad equipment, including materials, parts, and appurtenances. No federal court of appeals or state court of last resort ever has held to the

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[4] *See also Southern Ry Co. v Lunsford*, 297 U S 398, 402 (1936) (holding that the BIA encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary]"); *California v Taylor*, 353 U.S. 553, 560 n 8 (1957) (citing *Napier* and other cases "upholding the supremacy of federal statutes relating to railroads in interstate commerce"), *Bethlehem Steel Co. v New York State Labor Relations Bd* , 330 U.S. 767, 772 (1947) (citing *Napier* and other cases recognizing implied field preemption based on the existence of a comprehensive federal regulatory scheme that leaves no room for the states to supplement it), *Guss v Utah Labor Relations Bd.*, 353 U S 1, 10 (1957) (same), *Ray v Atl Richfield Co.*, 435 U S. 151, 157 (1978) (same); *Consol. Rail Corp. v Pa Pub. Util. Comm'n*, 536 F. Supp. 653 (E D Pa 1982) (applying *Napier* and holding that LIA preempted state law requiring locomotives to have speed records and indicators), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983).

contrary, with the singular exception of the Pennsylvania Supreme Court. *See Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). In *Norfolk & Western*, the Pennsylvania Supreme Court held that the passage of the FRSA in 1970 implicitly altered LIA field preemption and re-opened the field to state regulation.

Norfolk & Western's construction of the FRSA and the LIA is irreconcilable with the plain language and express purposes of the two statutes and has been rejected by every other federal court and state court of last resort that has addressed the LIA's preemptive effect.

Most importantly for purposes of the three pending petitions, however, *Norfolk & Western* was impliedly overruled by this Court only three years after it was issued. *See Consol. Rail Corp.*, 536 F. Supp. at 653, *aff'd mem.*, 696 F.2d at 981, *aff'd mem.*, 461 U.S. at 912. In *Consolidated Rail Corp.*, a plaintiff railroad challenged a Pennsylvania statute that required locomotives to have speed recorders and indicators, contending the BIA preempted this state regulation. Relying on *Norfolk & Western*, the Commonwealth argued that the enactment of the FRSA in 1970 redistributed railroad regulatory authority and implicitly abrogated *Napier*'s LIA field preemption holding. *Id.* The district court expressly rejected *Norfolk & Western*'s reasoning and holding and held that *Napier* was controlling. *Id.* Both the Court of Appeals and this Court affirmed summarily. The Court has made it clear that a summary affirmance must "be understood as ... applying principles established by prior decisions to the particular facts involved," and as "prevent[ing] lower

courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Concomitantly, this Court's summary affirmance in *Consolidated Rail* must be understood as applying the principles established in *Napier* and its progeny to the particular facts of *Consolidated Rail* to prevent lower courts from concluding, as the *Norfolk & Western* court did, that the FRSA's enactment abrogated *Napier*'s preemption analysis and holding.

Indeed, since *Consolidated Rail Corp.*, courts have heeded its directive. No federal court of appeals or state court of last resort has ever called LIA's preemptive reach into question. On the contrary, a solid phalanx of federal and state court decisions have applied *Napier* and its progeny and held that the LIA preempts state common law and statutory claims against manufacturers and distributors of locomotive and railcar equipment, parts, and appurtenances. This body of case law includes at least eight decisions by six federal courts of appeals (including the decision below),[5] six decisions by five

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[5] *See Forrester v. American Dieselelectric, Inc.*, 255 F 3d 1205 (9th Cir 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v Gen. Motors Corp.*, 114 F 3d 908 (9th Cir. 1997) (BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise), *First Security Bank v Union Pacific R R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects), *Springston v. Consol. Rail Corp* , 130 F 3d 241 (6th Cir 1997) (BIA preempts claim based on inadequacy of warning

state courts of last resort,[6] and numerous decisions by federal district courts, state intermediate appellate courts, and state trial courts.[7]

(continued)

devices), *Oglesby v. Delaware & Hudson Ry. Co* , 180 F.3d 458 (2d Cir. 1999) (BIA preempts claim that manufacturer should have placed warning label on defective seat), *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Mo Pac. R R. Co. v. R.R. Comm'n of Tex.*, 833 F 2d 570 (5th Cir 1987) (BIA preempts state requirement for emergency equipment).

[6] *See Darby v. A-Best Prods Co.*, 811 N.E 2d 1117 (Ohio 2004) (BIA preempts state tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va 2003) (BIA preempts any state action that would affect the design, the construction, and the material of locomotives), *Gen Motors Corp v. Kilgore*, 853 So.2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheuding v Gen. Motors Corp* , 993 P.2d 996 (Cal. 2000) (BIA preempts state defective design and failure-to-warn claims against manufacturer); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont 2000) (BIA preempts common law claims against railroad concerning locomotive equipment), *Norfolk S Ry Co. v. Denson*, 774 So.2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning).

[7] *See Stevenson v. Union Pac. R.R Co.*, No 4 07CV00522BSM, 2009 WL 2702774 (E D. Ark Jan. 20, 2009) (holding that the BIA preempts a contribution and indemnification claim because the underlying claim was preempted by the BIA), *D'Amico v Garlock Sealing Techs , LLC*, No. 92-5544, 2007 WL 2702774, at *7 (E.D Pa. Sept. 13, 2007)

In particular, the Court of Appeals here, and four state courts of last resort, have held expressly that the LIA *does* preempt state common law and statutory tort claims by railroad employees allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. App. 6a-21a; *see Darby*, 811

(continued)

("Forcing railroad manufacturers to conform to state design and construction standards would naturally impinge on the field of locomotive equipment that Congress occupied through the BIA"), *Roth v. I & M Rail Link LLC*, 179 F. Supp 2d 1054 (S.D. Iowa 2001) (BIA preempts state law negligence claims against the manufacturer of a locomotive); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sept. 22, 1993*, 188 F Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common law negligence and design defect claims against Amtrak), *Wright v Gen. Electric Co.*, 242 S W 3d 674 (Ky. Ct App. 2007) (BIA bars state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastaci v Vapor Corp.*, 70 Cal. Rptr 3d 402 (Cal. Ct App. 2007) (BIA forecloses state tort claims against locomotive manufacturers for defective design of their product), *Caradonna v. A W Chesterton Co., Inc.*, No 0106785/2006, 2007 N Y Misc LEXIS 8994 (N Y. Slip Op. April 25, 2007) (finding claims of railroad worker, against various manufacturers of locomotives and their components and parts, preempted under the BIA), *Seaman v. A.P. Green Indus. Inc.*, 707 N Y S 2d 299 (N Y. Sup Ct 2000) (finding federal field preemption under the BIA and accordingly dismissing all claims against locomotive manufacturer), *In re Train Collision at Gary, Ind.*, 670 N E 2d 902 (Ind. App. Ct. 1996) (BIA preempts claims regarding alleged defects in the design and structure of train cars), *Key v. Norfolk S. Ry. Co.*, 491 S E 2d 511 (Ga. App. Ct. 1997) (BIA preempts common law claims against railroad by employee injured in fall from locomotive steps).

N.E.2d 1117; *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (noting the "avalanche" of authority in favor of LIA field preemption); *Gen. Motors Corp.*, 853 So.2d 171; *Scheiding*, 993 P.2d 996.[8]

There are only two decisions, by a single state's intermediate appellate court, contrary to this "avalanche" of uniformity. *See Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), *appeal denied*, 996 A.2d 490 (Pa. 2010), *petition for cert. pending*, No. 10-272; *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (TABLE), *appeal denied*, 3 A.3d 671 (Pa. 2010), *petition for cert. pending sub nom. Griffin Wheel, Inc. v. Harris*, No. 10-520. These decisions, however, do not create a compelling reason or need for this Court to grant review, invest its scarce resources, and add its voice to the chorus.

As an initial matter, this Court rarely grants review based on conflicts involving state intermediate appellate courts. In addition, the decision below is a definitive declaration of the preemptive principles that will control federal courts in Pennsylvania and likely will be influential in any subsequent analysis of the preemption issue undertaken by Pennsylvania's state courts. If Pennsylvania courts follow the Court of Appeals'

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[8] Other decisions are in accord, uniformly applying the LIA to preempt state common law and statutory claims in these circumstances. *See D'Amico*, 2007 WL 2702774, at *7; *Wright*, 242 S.W.3d at 674; *Frastaci*, 70 Cal. Rptr. 3d at 402; *Caradonna*, 2007 N.Y. Misc. LEXIS 8994, at *1; *Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d at 299.

decision in this case and embrace the controlling rule, then any nascent conflict will be resolved. Moreover, even if the Pennsylvania courts continue to follow the intermediate appellate decisions in *Atwell* and *Harris*, the Pennsylvania Supreme Court can take up the issue with the added benefit of the Court of Appeals' decision below, as well as this Court's controlling decision in *Consolidated Rail Corp.* If the Pennsylvania Supreme Court splits from the unbroken line of cases cited previously, this Court could then intervene based on a genuine conflict among the federal courts of appeals and the state courts of last resort.

II. The Court Of Appeals' Decision Follows And Faithfully Applies The Controlling Law Dealing With The LIA's Preemptive Effect.

The petition also should be denied because the Court of Appeals' decision here is correct and further reinforces the controlling law regarding the LIA's intended preemptive effect. There is, in short, nothing in this case that needs to be fixed.

In *Napier*, 272 U.S. at 611-13, this Court considered a preemption challenge to a Georgia law that required all trains operating in the state to have an automatic fire door and a cab curtain. The Court found that, through the LIA, Congress conferred on the Interstate Commerce Commission the "general" power to regulate the safety of railroad equipment, that the Commission's power extended "to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances," and that the "broad scope" of the LIA's delegation of power to the Commission led to the conclusion that the LIA was intended to occupy the entire field of

regulation and preempt all state laws falling within the scope of the Commission's authority. *Id.*

The Court also specifically noted that the delegation of powers to the federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers. *Id.*

The broad scope of the LIA's delegation of regulatory authority to the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the FRA) and the statute's preemptive effect on state laws and state law claims relating to the design, construction, and material of railroad equipment, parts and appurtenances flows directly from the need to maintain uniformity of railroad operating standards across state lines. As the FRA has pointed out,

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion....
>
> ...
>
> [P]iecemeal regulation of individual hazards ... by any other agency of government would be disruptive and contrary to the public interest.

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10583, 10585-86 (March 14, 1978).

And, as the Ninth Circuit further highlighted in *Law*, "[t]he virtue of uniform national regulation 'is self-evident: locomotive companies need only concern

themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" 114 F.3d at 910 (quoting *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807, 811 (9th Cir. 1993)); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress' general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). Accordingly, "[a]ny state law that undermines this regime is preempted ...." *Law*, 114 F.3d at 910.

State law statutes or claims attempting to regulate allegedly defective or dangerous railroad equipment thus must be preempted to preserve the uniform and exclusive federal scheme Congress established. As one court explained it:

> "A railroad equipment manufacturer found to have negligently designed a braking system ... is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined."

Gen. Motors Corp., 853 So.2d at 175-76 (quoting *Law*, 114 F.3d at 910-12 (citations and footnote omitted)); *see also Scheiding v. Gen. Motors Corp.*, 993 P.2d at 1003 (same).

Here, the avowed Congressional goal to provide for exclusive and uniform federal regulation regarding the design, construction, and safety of all railroad equipment, including parts and appurtenances, would be undermined if state law tort claims like those urged by Petitioners were allowed. Such claims, in purpose and effect, would intrude on the regulatory field occupied exclusively by the LIA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (recognizing that state law remedial actions can be, and are designed to be, a form of state regulation incompatible with a comprehensive federal regulatory and remedial scheme); *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286-87 (1986) (under *Garmon*, where there is a "complex and interrelated federal scheme of law, remedy, and administration," field preemption principles bar a state from adding to the remedies provided by the integrated federal regulatory scheme).

The Court of Appeals' decision in this case explicates and embraces the rationales underlying this overarching preemptive principle and faithfully applies them to Petitioners' state law tort claims. App. 6a-21a. As the Court of Appeals firmly and definitively concludes:

> The goal of the LIA is to prevent the paralyzing effect on railroads from prescription by each state of the safety

> devices obligatory on locomotives that would pass through many of them. ... In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts. ...
>
> If each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states.

App. 12a-14a (internal quotations and citations omitted).

On review of the relevant federal statutory scheme, the relevant preemption principles, and the relevant authorities, therefore, it is apparent that the Court of Appeals' decision is on solid footing and reaches the correct result. Its analysis is comprehensive, on point, and leaves nothing further to add. An opinion of that kind does not need or require further review by this Court.

III. This Case Does Not Raise Any Issue About The LIA's Preemptive Effect That Requires Further Attention From This Court.

Despite the uniformity of the case law, Petitioners maintain that the LIA's preemptive effect somehow is in doubt based on decisions rendered by this Court after *Napier*, by subsequent legislative actions, by the limitations on private actions under FELA, and

by regulatory action by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. None of these contentions has merit and none provides a reason to grant review in this case.

A. No Decision Of This Court Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners claim that the Court of Appeals' decision is contrary to a series of decisions by this Court. Pet. 15-21 (citing *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934); *Tipton v. Atchison, T.&S.F.R. Co.*, 298 U.S. 141 (1936); *Atchison, T.&S.F.R.Co. v. Scarlett*, 300 U.S. 471 (1937); *Breisch v. Central R. of N.J.*, 312 U.S. 484 (1941); *Shields v. Atlantic C.L.R. Co.*, 350 U.S. 318 (1956)).[9] None of the cited decisions addresses the preemptive scope of the LIA as established in *Napier* or casts doubt on the LIA's preemptive effect on state tort claims concerning the design, construction, and safety of

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[9] Although these authorities take stage-center in the petition, none was identified by Petitioners, either in their appellate merits briefing or their petition for rehearing, as being relevant to the analysis of the LIA's preemptive reach. App. 1a-21a, 42a-43a. Petitioners therefore are asking this Court to grant certiorari based on an argument about a purported conflict not covered in the briefing below or vetted by the Court of Appeals. Nor is the purported conflict yet exposed in any lower court decisions, much less dispositive decisions from any federal circuit court of appeals or state courts of last resort. Simply put, this is not the sort of conflict or record that provides an adequate basis for this Court to grant review

federally regulated railroad equipment. Indeed, the cases do not deal with LIA preemption at all.

The earliest of the cases cited in the petition, *Meredith*, 292 U.S. at 589, concerned whether "travelers at railway-highway crossings" have standing to sue a railroad for injuries caused by a failure of the railroad to comply with the SAA. The case had nothing to do with the LIA or its preemptive effect on state law and did not discuss the Court's reasoning or holding in *Napier*.

The same goes for *Tipton*, 298 U.S. at 141. That case concerned the pleading of claims for alleged violations of the SAA in intrastate commerce; the resolution of that question did not involve *Napier* or the LIA or its preemptive reach. *See also Breisch*, 312 U.S. at 484 (same).

Scarlett, 300 U.S. at 471, and *Shields*, 350 U.S. at 318, also are inapposite. *Scarlett* and *Shields* concerned whether brace rods and dome running boards (respectively) were safety devices covered by the SAA. *See Scarlett*, 300 U.S. at 475; *Shields*, 350 U.S. at 318. The Court's analysis in each case was limited to the statutes and regulations relevant to the particular questions presented and did not implicate the preemptive reach of the LIA under *Napier*.[10]

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[10] Contrary to the petition (at 36-40), *Wyeth v. Levine*, --- U.S. ----, 129 S.Ct. 1187, 1192 (2009), also does not cast doubt on *Napier*'s preemption analysis. *Wyeth* involved principles of conflict preemption, the doctrine of field preemption was not before the Court. *Id.*

On reasoned analysis, Petitioners' attempt to use these unrelated cases to cast doubt on *Napier*'s reasoning and holding collapses. There is no need for this Court to grant review to dispel the non-existent "conflict" that Petitioners have invented and now advance.

B. No Legislative Action Or Other Development Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners also claim that the Court of Appeals' preemption analysis fails to account for subsequent legislative developments, limitations on private actions under FELA, and regulatory actions by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. But these arguments have been rejected repeatedly by courts that have confronted them. App. 9a-10a n.5, 16a-21a; *see, e.g., Darby*, 811 N.E.2d at 1125-26; *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 823-24; *Gen. Motors Corp.*, 853 So.2d at 176-80; *Scheiding*, 993 P.2d at 999-1004. There is no perceptible reason for this Court to grant review to weigh in on these settled issues.

To begin with, the Court of Appeals properly rejected Petitioners' arguments that the FRSA altered and withdrew LIA field preemption. Pet. 26-33; App. 18a-21a. Any question about the FRSA's impact on LIA field preemption likewise would appear to be answered definitively by this Court's summary affirmance of *Consolidated Rail Corp.* *See supra* pp. 7-11. Contrary to the petition, nothing in the FRSA repeals the LIA or purports to withdraw the federal regulator's power over the entire field

relating to the design, construction, and safety of railroad equipment and parts. In reality, the statute expressly authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety ..." and provides that "[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20103(a), 20106(a).[11]

Furthermore, the Court of Appeals also properly rejected Petitioners' argument that the LIA has no preemptive effect on state law claims related to incidents that occur when a train is not "in use." Pet. 25; App. 9a-10a n.5. Here, Petitioners' argument conflates LIA field preemption with FELA's standard for absolute liability for railroad employers. Under FELA, the absolute liability of railroads for the injuries of their employees depends on whether locomotives and rail cars are "in use" at the time of the accident. *See, e.g., Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). However, this rule

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[11] The 2007 FRSA amendment touted in the petition also is irrelevant to any field preemption analysis in this case. The stated purpose of the 2007 amendment was to nullify the effect of two federal court decisions—*Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006), and *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006)—that (1) arose out of a January 18, 2002 Minot, North Dakota train derailment and (2) concern not LIA field preemption, but only an express preemption provision of the FRSA. App. 34a (district court decision collecting authorities). In addition, the 2007 amendment applies only to events occurring on or after January 18, 2002 (the date of the Minot derailment). Here, Petitioners' claims arose from exposure that allegedly began and ended years before the 2007 amendment's effective date.

has nothing to do with the scope of LIA preemption. The field of regulation occupied by the LIA encompasses all aspects of the design, construction, and safety of railroad equipment, parts, and appurtenances—characteristics that remain the same regardless of whether a train is "in use" or "off-line." *See Napier*, 272 U.S. at 611-13; *Lunsford*, 297 U.S. at 402; *see also D'Amico*, 2007 WL 2702774, at *7 (rejecting Petitioners' argument); *Frastaci*, 70 Cal. Rptr. 3d at 403-04, 408-10 (same); *Seaman*, 707 N.Y.S.2d at 302 (same).

Finally, the Court of Appeals likewise got it right in dismissing Petitioners' arguments that the FRA had narrowed the scope of LIA field preemption by ceding regulatory control over locomotives and railcars in repair shops to the Occupational Safety and Health Administration. Pet. 33-36; App. 16a-17a. As the court explained in rejecting Petitioners' assertion, such claims emanate, not from the working conditions of repair shops, but from the "material used to construct railroad equipment, parts, and appurtenances"—areas regulated exclusively by the FRA under the LIA. App. 16a-17a.

In this case, the Court of Appeals' analysis puts all legislative, regulatory, and remedial developments since *Napier* in their proper perspective and shows why they do not impact the analysis of the LIA's intended preemptive reach. No conceivable concerns requiring this Court's attention are raised in any part of that analysis. Petitioners' claims to the contrary lack merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
Tel: (412) 288-3131
Fax: (412) 288-3063
E-mail:
jcmartin@reedsmith.com
Counsel for Respondent
Railroad Friction
Products Corporation

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IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

Attorneys for Respondent Viad Corp

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SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

The petition in this case is one of three similar petitions pending before this Court, all of which present the question whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*—now called the Locomotive Inspection Act (LIA)—preempts state regulation of the design of locomotives and their parts and appurtenances, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926). *See also John Crane, Inc. v. Atwell*, No. 10-272 (filed Aug. 23, 2010); *Griffin Wheel Co. v. Harris*, No. 10-520 (filed Oct. 12, 2010). On November 1, 2010, this Court invited the Acting Solicitor General to file a brief expressing the views of the United States in *Atwell*. *See* 131 S. Ct. 552. That brief was filed on May 6, 2011. Respondent Viad Corp submits this supplemental brief in response.

As explained below, the government's brief urging review in *Atwell* actually makes a persuasive case for *denying* review in that case, both as a vehicle for resolving the question presented generally, and for considering the various novel preemption theories articulated in the government's brief. If this Court is inclined to examine the scope of LIA preemption, it should do so in the instant case, which presents a more appropriate factual vehicle for evaluating the competing theories now before the Court.

ARGUMENT

The LIA delegates to the Department of Transportation (DOT) authority to regulate "the locomotive or tender and its parts and appurtenances." 49

U.S.C. § 20701. In *Napier*, this Court held that because of the "broad scope of the authority conferred upon the [DOT]," the LIA "was intended to occupy the field" of regulation delegated to DOT, which the Court defined as "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611, 613.

The government correctly argues that no post-*Napier* acts of Congress or precedents of this Court altered the scope of LIA field preemption identified in *Napier*. U.S. Br. 19-22. The government also argues, however, that the LIA only governs the design and construction of locomotives that are *in use*, and that the statute's field preemptive scope thus extends only to claims arising from injuries sustained while the locomotive is actively being used, and not when it is being repaired off-line. That proposition is contrary to *Napier*, the LIA, and the settled law of every jurisdiction to have considered the question, save Pennsylvania. It is also contrary to common sense: the design and construction of a locomotive are the same whether it is on the track or in the repair house.

The government recognizes that common-sense problem and answers it by proposing a *new* LIA preemption rule to supplement the narrow "in use" field preemption the government describes. The government says claims concerning the design, construction, or material of a locomotive in the repair house are not field preempted under *Napier* but are *conflict* preempted, because such claims frustrate the purpose of the LIA. The distinction has never been adopted by any court, and it makes no sense: design-defect-type claims would conflict with the LIA's

purpose only because that purpose was to make regulation of locomotive design an exclusively federal matter, which is precisely the reason *Napier* held that all such claims are *field* preempted.

Finally, the government proposes yet another new wrinkle on LIA preemption. It contends that failure-to-warn claims (unlike design defect claims) are neither field nor conflict preempted, because such claims would not literally require manufacturers to alter the design or construction of the locomotive. That distinction, too, is untenable. Every claim seeking to establish liability for a given locomotive design choice can be recast as a claim to establish liability for failing to give a proper warning about that design choice. The point of the LIA is to prohibit states from establishing and enforcing their own legal standards concerning locomotive design, which is exactly what a state does when it decides that a particular design is unlawful unless accompanied by the state's own chosen warning.

A. LIA Field Preemption Extends To All State Regulation Of Locomotive Design And Construction

The government agrees with Viad that the LIA preempts the regulatory field of locomotive design and construction, but asserts that the field extends only to locomotives that are actively "in use" at the time a claimant's injury is sustained. That does not mean, however, that state-law claims concerning locomotive design arising from injuries sustained when the locomotive is *not* in use are free to proceed. Those claims, too, are preempted, the government contends, because they conflict with the LIA's pur-

pose of making locomotive design exclusively subject to federal regulation. Yet failure-to-warn claims arising from off-line injuries—even claims asserting failure to warn of a defective design—are *not* conflict preempted on the government's view. These complicated distinctions are unprecedented, unnecessary, and unsupported by the statute's text and purpose.

1. The government's principal contention is that the LIA preempts the field of claims based on injuries arising when a locomotive is in use, but not when it is being repaired. U.S. Br. 11-18. The government asserts that the LIA regulates only locomotives and locomotive parts actively in use. U.S. Br. 11-13. And since the "preempted field is coextensive with the regulated field," field preemption "encompasses only claims based on injuries arising from operational locomotives." U.S. Br. 13.

The government is correct that the scope of field preemption is determined by the scope of the regulated field. But the pertinent regulated field here is defined by the regulatory authority delegated to DOT, which is *not* restricted to regulating only locomotives actively being used.

a. The government's argument that the "LIA regulates only the *use* on railroad lines of locomotives or tenders and their parts and appurtenances," U.S. Br. 11 (emphasis added), rests wholly on the first portion of the relevant LIA provision, which says that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... are in proper condition and safe to

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1).

That provision sets forth the standard of care applicable to "railroad carrier[s]." But, as the government acknowledges, the field preemptive scope of the LIA is defined not by the duties it imposes on railroads, but by the authority it delegates to DOT. U.S. Br. 13. The provision cited by the government does not address DOT's regulatory authority. That authority is broader than the standard of care imposed on railroad carriers—it wholly encompasses "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611; *see, e.g*, 49 U.S.C. § 20701(2) (requiring DOT to prescribe standards for inspection); *id.* § 20702(a)(3) (requiring DOT to "ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances ... and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again").

In the context of DOT's regulatory authority, the "in use" requirement of the standard of care is irrelevant, because a locomotive's design and construction are the same whether the locomotive is in use or not. A state obviously could not enact a statute requiring locomotives to be constructed entirely from a particular type of material, and then circumvent the LIA by issuing citations for violations of the statute only against locomotives parked in repair stations. A state just as obviously could not enact a statute prohibiting the use of a particular material—such as asbestos—in locomotive construction, avoiding the LIA by simply enforcing the statute only against lo-

comotives being repaired off line. But that is precisely the effect of the United States' contention that LIA field preemption is categorically inapplicable to locomotives parked for repairs.

The government makes the same mistake in relying on cases concerning the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* That statute permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957). And a worker can establish negligence per se under FELA by proving a violation of the LIA or other rail safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). In FELA claims seeking to establish per se liability because of violations of the LIA, the courts of appeals have held that a railroad is per se liable only when the injury was sustained when the locomotive was "in use." U.S. Br. 12-13 (citing cases).

The "in use" requirement makes sense in the FELA context. FELA establishes a tort action against a railroad, and the scope of the railroad's per se liability is defined by the standard of care prescribed by the LIA. And, as explained, the standard of care established in the LIA applies only to the "use[]" and "operat[ion]" of the locomotive. 49 U.S.C. § 20701(1). But as also explained, preemption does not arise from the LIA's standard of care—it arises from delegation to DOT of exclusive regulatory authority over locomotive design and construction. And nothing in the LIA restricts DOT to regulating locomotive design and construction only while the

locomotive is actively being used. Federal regulations concerning those matters are not suspended at the roundhouse door.[1]

2. The government appears to recognize that it is senseless to preempt state regulation of locomotive design only when the locomotive is in use. To make its rule defensible, the government argues that while state-law claims involving repair-station injuries arising from the design of the locomotive are not *field* preempted, they are *conflict* preempted, because any claim based on locomotive design would frustrate the LIA's objectives. U.S. Br. 16-17 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Failure-to-warn claims, in contrast, apparently would be open to state regulation. U.S. Br. 17. The govern-

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[1] The government says that if claims based on injuries sustained in a repair station are preempted, then certain persons who suffer injuries there due to a locomotive's design or construction—i.e., contractors and third parties, or railroad employees who cannot prove simple negligence by their employers under FELA—would have no remedy for their injuries. U.S. Br. 13-15. But as the government recognizes, "[d]epriving injured individuals of a remedy may be justified when allowing a remedy would prevent the LIA from achieving its purposes," U.S. Br. 15, and the purpose of the LIA was to preclude states from regulating any aspect of locomotive design and construction. The government itself concedes that a contractor or third party outside the scope of FELA lacks a remedy against a manufacturer for design- and construction-related injuries occurring on line—the government does not explain why it makes "practical sense" (U.S. Br. 13) to treat those asserting injuries in the roundhouse differently. As for employee claims under FELA, the employer's negligence need only play the "slightest" part in the injury. *See supra* at 6. Given that easily-satisfied standard, there is no need to distort settled LIA preemption doctrine to provide railroad employees with claims against locomotive manufacturers.

ment's proposed conflict preemption rule is a field preemption rule by another name, and its distinction between design defect and failure-to-warn claims is untenable.

a. The government's proposed conflict preemption rule—which has never been adopted or even considered by any court—merely demonstrates the error of its primary position, *viz.*, that the field-preemptive scope of the LIA reaches only claims stemming from injuries sustained when the locomotive is in use. On the government's view, *every* claim based on locomotive design, construction, or material, while not field preempted, would still be conflict preempted because it would frustrate the objectives underlying the LIA. But that can be true only if the LIA's objective was to ensure that DOT—and not the states—was the exclusive source of legal standards governing locomotive design, construction, and material, irrespective of whether the locomotive happens to be "in use" at the time a legal standard is applied. In other words, the government's theory that a state law regulating locomotive design in repair shops conflicts with the LIA necessarily refutes its theory that the regulatory field occupied by the LIA is limited only to locomotives actively in use.

b. The government's proposed distinction between design defect claims (which it says are conflict preempted) and failure-to-warn claims (which are not) also does not survive scrutiny. The government contends that accepting a failure-to-warn claim "would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." U.S. Br. 17. That distinction is misleading at best: while a failure-to-warn claim may

not itself literally mandate alteration of the design or construction of a locomotive, it comes to the same place, because the claim still (a) involves differing state-created standards for lawful locomotive design and manufacture, and (b) imposes liability under state law for violation of those standards.

It is clear that, if failure-to-warn claims were permissible, "states could promulgate otherwise pre-empted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). Such claims thus directly contradict the LIA's objective of precluding states from imposing their own "differing requirements concerning locomotive design and construction." U.S. Br. 17. If states lack authority to decide that certain locomotive designs are unlawfully dangerous, they cannot have authority to decide that such designs are unlawfully dangerous if implemented without state-prescribed warnings.

Failure-to-warn claims also raise the same concerns about conflicting state standards that design defect claims raise. Because repairs to locomotives may need to take place at any time, locomotives would need to be equipped with warnings that are sufficient in every state through which they travel. But states may require different formulations of the same warning, and a warning that one state mandates might be viewed by another as unnecessarily cluttering a warning label and thus affirmatively reducing the effectiveness of its own required warnings. And even if it were possible to comply simultaneously with every state's warning requirements,

the state with the most stringent requirements would effectively be able to impose its law as a nationwide standard, which is exactly what Congress sought to avoid by enacting the LIA. *See, e.g.*, *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910-11 (9th Cir. 1997).[2]

B. The Government's Brief Suggests That *Atwell* Is Not The Most Suitable Vehicle For Addressing The Question Presented

The LIA applies only to "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. But as the government observes, the trial court in *Atwell* found that the materials that allegedly caused the injury in that case were not locomotive parts and appurtenances, and thus were not subject to the preemptive effect of the LIA, whatever its scope. U.S. Br. 17. The government says that locomotive parts and appurtenances do not "include generic materials that require modification before they are suitable for use on locomotives," and the materials manufactured by John Crane, Inc. "appear to fall into that category of generic materials." *Id.* at 18.

The United States nonetheless urges the Court to grant John Crane's petition for certiorari: "Because the claims are outside the field based on the 'in use'

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[2] The government might mean to exclude from conflict preemption only failure-to-warn claims involving "materials used to repair locomotives" (U.S. Br. 17), but it is not clear why such claims would even implicate the LIA in the first place—unless those materials are "parts and appurtenances," in which case the LIA precludes states from imposing warning standards on their design and construction.

requirement [of the LIA], this Court need not address [whether John Crane's products are parts or appurtenances] if it grants review." *Id.* at 17. This Court, however, normally does not grant review when its decision would not likely affect the outcome of the case. E. Gressman et al., *Supreme Court Practice* 504 (9th ed. 2007). If the government and the *Atwell* trial court are correct, nothing this Court said about the scope of LIA preemption would affect the ultimate disposition of *Atwell*, because the LIA would not apply at all to the claims in that case.

That problem does not exist in the instant case. Viad Corp is the alleged successor-in-interest to a company that manufactured the entire locomotive, not just components that may or may not qualify as parts or appurtenances under the LIA. The proper scope of LIA preemption is thus unavoidably presented in this case.

What is more, the government's error in asserting that failure-to-warn cases are not preempted may be a product of the particular facts of *Atwell*, which appears to concern products that "required cutting and other manipulation before they could be installed on locomotives." U.S. Br. 18. The government suggests that imposing warning requirements on such products does not threaten the ability of locomotives to move freely across state lines. That position is dubious on its own terms, but it becomes fantastical when applied in the context of a case like this one involving an entire locomotive. The government does not explain how a manufacturer could attach labels to the locomotive sufficient to satisfy the varying laws—typically, unwritten tort laws—of every state the locomotive might travel through. Indeed,

that is why the LIA reaches only locomotives and their parts and appurtenances, which *by necessity* travel across state borders. If this Court is inclined to address the government's new preemption theories, it should do so in a case that involves an entire locomotive, and thus presents those theories in the sharpest relief.

CONCLUSION

Certiorari should be granted, and the judgment below should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

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In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com

Counsel for Respondent Railroad Friction Products Corporation

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Respondent Railroad Friction Products Corporation ("RFPC") made pursuant to Supreme Court Rule 29.6 and set forth in RFPC's brief in opposition remains current, with no amendment necessary.

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On May 6, 2011, the federal government filed an amicus curiae brief in *John Crane, Inc., v. Atwell*, No. 10-272, which recommends that the Court: (1) grant the petition for a writ of certiorari filed by John Crane, Inc.; (2) hold the petitions in this case and *Griffin Wheel, Inc. v. Harris*, No. 10-520, pending *Atwell*'s disposition; and (3) affirm the decision of the Superior Court of Pennsylvania in *Atwell*.

With respect to the last point, the government concedes that the Pennsylvania superior court's decision in *Atwell* is "erroneous" in holding that various acts of Congress and precedents from this Court have narrowed the preemptive effect of the Locomotive Inspection Act ("LIA") on state law. U.S. Br. 10, 19-22. Nevertheless, the government recommends that the superior court's decision be affirmed on the alternate ground that the field preempted by the LIA does not encompass state-law tort claims based on exposure to asbestos during the repair of locomotive parts and equipment at railroad maintenance facilities, while the parts and equipment are not in use on a railroad line. U.S. Br. 11-18. RFPC submits this supplemental brief in response.

There are a number of glaring problems with the government's novel arguments concerning the preemptive effect of the LIA on state-law tort claims. The most fundamental of these is that there is no clear and irreconcilable conflict among the circuit courts and state courts of last resort on the question presented, even as re-framed by the government. Here, the government's arguments only serve to underscore why the question presented does not warrant this Court's attention at this time.

ARGUMENT

1. Because Of Congress's Broad Delegation Of Regulatory Power To The Secretary, The LIA Preempts All State Regulations Directed To The Design, Construction, And Material Of Railroad Equipment and Parts.

1 To begin with, the government's novel and convoluted view of the LIA's preemptive effect conflicts with this Court's reasoning and holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926).

a. In *Napier*, this Court considered the field occupied by the LIA and the LIA's preemptive effect on state laws "directed to ... the equipment of locomotives." 272 U.S. at 611-13. The Court held that: (1) through the LIA, Congress conferred on the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the Federal Railroad Administration ("FRA")) the "general" power to regulate the safety of locomotive equipment; (2) the federal regulator's delegated power extended "to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances;" and (3) the "broad scope" of the LIA's delegation of power to the federal regulator led to the conclusion that the LIA was intended to occupy the entire field of regulation concerning locomotive equipment and preempt all state laws falling within the scope of the regulator's authority. *Id.*

The Court also noted that the broad delegation of these powers to the federal regulator meant that any state law "directed to the same subject—the

equipment of locomotives"—was preempted, regardless of whether the regulator actually had exercised its powers. *Id.*

b. The "field" occupied by the LIA, thus, is defined in terms of the federal regulator's broad power over "the design, the construction, and the material" of physical objects that may be put to use on a railroad line—*i.e.*, "every *part* of the locomotive and tender and of all appurtenances." *Id.* (emphasis added). The Secretary's broad regulatory power does not vary depending on the transitory condition or location of a particular part or piece of equipment—*i.e.*, on whether a particular part or piece of equipment happens to be "on" or "off" the line or "in" or "out" of use at any moment. Of necessity, the design, construction, and material of all parts and equipment are first fixed, *off-line*, in *advance* of parts and equipment being put to use on a railroad line, and the design, construction, and material of such parts and equipment remains the same, both on and off the line. Indeed, there is no dispute that the LIA grants the Secretary regulatory power over *many* conditions and activities that occur in advance of parts and equipment first being put to use on the line, including regulatory power over manufacturers, who design, construct, and sell parts and equipment, off-line, for subsequent use on the line. *See* 49 U.S.C. § 21302; 49 C.F.R. §§ 229.7(b), 229.21-229.33 (collectively requiring daily inspections and periodic testing of various parts and subjecting "manufacturer[s] ... of railroad equipment" to penalties).

c. The government appears to agree that: (1) the LIA provides the Secretary with the power to

regulate the design, construction, and material of railroad parts and equipment in advance of the use of such parts and equipment on a railroad line; (2) the design, construction, and material of such parts and equipment "remain the same" whether or not the parts or equipment happen to be in use at any given moment; (3) state-law tort claims based on exposure to asbestos-containing materials in parts and equipment are directed, in purpose and effect, at the same "subject" as the LIA—namely, the "design, construction, and material" of those parts and equipment; and (4) state-law tort claims based on such exposure to asbestos-containing materials in parts and equipment "conflict" with the LIA, even when the exposure allegedly occurs during the repair of parts and equipment at railroad maintenance facilities, while parts and equipment are not in use. U.S. Br. 15-17 (conceding that such state-law tort claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the LIA]") (first alteration in the original).

Nevertheless, the government inexplicably contends that state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment lie outside the LIA's regulatory "field," as described in *Napier*. This is a non-sequitur, pure and simple. Under *Napier*, if the LIA gives the Secretary the power to regulate asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment actually is put to use on a railroad line (as the government concedes that the statute does), then the LIA also must be construed to preempt state tort laws directed to that

same subject—*i.e.*, asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment is put in use on a railroad line.

And, the LIA must be construed to have this preemptive effect on state law, regardless of whether the Secretary has exercised his powers on this subject and promulgated specific regulations that squarely conflict with the "object" of the state-law claims. *Compare Napier*, 272 U.S. at 611-13 (holding that the LIA preempts state laws that are "directed to" the design, construction and material of "locomotive equipment," regardless of whether the federal regulator actually has exercised its powers) *with* U.S. Br. 16-18 (suggesting that the preemption of state-law claims may depend on whether the "legal theory" underlying the claim "actually" conflicts with the LIA and federal regulations thereunder); *see also Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999) ("[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the LIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place.").

Under *Napier*, nothing more is, or should be, required to support the conclusion that the LIA preempts state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment at railroad maintenance facilities.

The same, plain reading of *Napier* also demonstrates that the government is just as wrong when it posits a possible distinction between the

LIA's preemptive effect on state-law tort claims based on exposure to asbestos and those based on a failure to warn about the design, construction, and material of parts and equipment containing asbestos. Under the LIA, the Secretary has the power to regulate not only the presence and use of asbestos-containing material in the design and construction of parts and equipment, but also the warnings that must be given along with such parts and equipment. Indeed, the Secretary often has exercised that power to direct warnings along with parts and equipment. *See, e.g.*, 49 C.F.R. §§ 210.27(d)(3) (labeling requirement for wayside noise levels), 215.9(a)(3) (warning posted on defective freight cars), 229.85 (warning notices for high voltage equipment), 229.113 (warning notices for steam generators), *cited in Law v. Gen. Motors Corp.*, 114 F.3d 908, 911 (9th Cir. 1997) (failure-to-warn claims within the regulatory field occupied by the LIA and delegated to the Secretary and his designee).

Moreover, as lower courts uniformly have recognized, if failure-to-warn claims are deemed to be outside the regulatory field of the LIA, "states could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). This is precisely what *Napier* and its progeny say is the exclusive regulatory domain of the federal government and something a state cannot touch.

2. The application of *Napier* and the LIA to state-law tort claims "directed to" asbestos-containing material in the design and construction of railroad

parts and equipment is straightforward and logical, and not "artificial[]" in any respect. *See* U.S. Br. 16. That is why courts repeatedly have rejected the narrowing argument advanced by the government and held that the LIA's preemptive effect on state law does not depend on whether railroad parts and equipment are actually "in use" at the time of the alleged exposure to asbestos. *See, e.g.*, *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396 n 5 (3d Cir. 2010), *reprinted in* App. 6a-21a; *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402, 409-411 (Cal. Ct. App. 2007); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000).

In fact, no court of appeals or state court of last resort *ever* has embraced the novel and convoluted theory of LIA field preemption that the government now advances. In its brief, the government grounds its theory primarily on cases decided under the Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. §§ 51, et seq. U.S. Br. 12-13 (citing cases). FELA provides an injured railroad employee with a cause of action to recover compensatory damages from a railroad when the railroad's negligence plays any part in causing an injury. Neither the assumption of the risk nor the contributory negligence of the employee is a defense to a railroad's FELA liability. 45 U.S.C. §§ 53, 54. And an injured railroad employee can establish negligence per se under FELA by proving that a railroad allowed parts and equipment to be used on its line without being in a proper and safe condition in compliance with the LIA or another railroad safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

In cases arising under this remedial regime, courts have held that a finding of negligence per se is permissible only when there are allegations and evidence that a part or piece of equipment was "in use" on the line when the injury occurred. U.S. Br. 12-13 (citing cases). That rule makes sense given the language of the relevant statutes defining the specific duty of care imposed on railroads under the LIA. *See* 49 U.S.C. § 20701(1).

But the preemptive effect of the LIA is a consequence not of the duty of care that the LIA imposes on railroad carriers, but the statute's broad delegation to the Secretary of exclusive power to regulate the design, construction, and material of parts and equipment. Moreover, as noted above, nothing in the LIA conditions the Secretary's regulatory power over design, construction, and material to those transitory periods when parts and equipment are actively being used on the line.

Simply put, *none* of the government's cited cases even implicates, much less undertakes to resolve, the scope of LIA field preemption under *Napier*. Accordingly, none provides evidence of a clear or irreconcilable conflict among the court of appeals or state courts of last resort over the scope of LIA field preemption or demonstrates any need for this Court's intervention.

II. There Is No Entrenched And Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

In its Brief in Opposition, RFPC urged the Court to deny the petitions pending in *Atwell*, *Harris*, and

this case (*Kurns*) because "there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach." RFPC Br. 5-13 (noting that since this Court's summary affirmance in *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983), no federal court of appeals or state court of last resort has called LIA's preemptive reach into question and that a solid phalanx of federal and state court decisions have applied *Napier* and its progeny uniformly).

The government's amicus brief proves RFPC's point: No matter how one frames the question presented, there is no conflict among the courts of appeals or the state courts of last resort concerning the LIA's preemptive effect on these state-law tort claims.

What is more, there is no dispute that the decision of the Third Circuit in this case provides a comprehensive and definitive declaration of the preemptive principles that will control federal courts in Pennsylvania—a declaration that likely will be influential in any subsequent analysis of the preemption issues undertaken by Pennsylvania's state courts or other federal or state courts.

This Court's consideration of the question presented, accordingly, should wait until other circuit courts and state courts of last resort, including in Pennsylvania, have had an opportunity to consider the Third Circuit's dispositive opinion in this case, as well as the novel arguments now advanced by the government. If a real conflict arises and ripens among the circuit courts and state courts of last

resort concerning the question presented, the Court can intervene to resolve that conflict in a future case that presents the question of the LIA's preemptive effect in a clearer and cleaner factual and legal context. *See* RFPC Br. 12-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

May 18, 2011

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
Tel: (412) 288-3131
Fax: (412) 288-3063
E-mail:
jcmartin@reedsmith.com
Counsel for Respondent
Railroad Friction
Products Corporation